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WE, knowing the great Learning and Judgment of the Author, do for the Public Good, allow and approve of the printing and publiſhing of the Reports of Sir CRESWELL LEVINZ, knt, in Three Parts, all written with his own Hand.

7th March, 1700.

N. Wright, C. S.
John Holt,
Tho. Trevor,
Edw. Ward,
Ed. Nevill,
Jo. Turton,
John Powell,
Littleton Powys,
Jo. Blencow,
Hen. Hatſell,
H. Gould,
R. Tracy,
Tho. Bury.

THE

REPORTS

OF

SIR CRESWELL LEVINZ, KNT.

LATE ONE OF THE JUDGES

IN THE

COURT OF COMMON PLEAS,

AT

WESTMINSTER,

Containing

CASES

HEARD AND DETERMINED IN THE

COURT OF KING'S BENCH,

During the Time that Sir MATTHEW HALE, Sir RICHARD RAINSFORD, and Sir WILLIAM SCROGGS were Chief Juſtices there; as, alſo, of certain Caſes in other Courts at WESTMINSTER during that Time;

Tranſlated into Engliſh

BY MR SERJEANT SALKELD, and others,
OF THE MIDDLE TEMPLE.

With two Tables,
The one of the NAMES of the CASES, and the other of the PRINCIPAL MATTERS contained therein.

THE THIRD EDITION.

Carefully corrected; with many Thouſand References to Modern Authorities never before printed.

BY THOMAS VICKERS, ESQ. BARRISTER AT LAW.

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Term.

Term. Sanct. Mich.

ANNO

12 Car. II. in Banco Regis.

PART I.

Slater againſt *Slater and his Wife.*

DEBT was brought againſt them on an Obligation ſealed by them both, and both were taken by *Capias:* It was moved for an *Habeas Corpus* to bring them into Court, to the Intent that the Huſband only might be committed in Cuſtody, and the Wife diſcharged; (and it was held) by the Court, that this *Habeas Corpus* for removing the Bodies might have been for them without Motion; but where the Party is committed for a Crime, there it ought to be on Motion.

Huſband and Wife taken on an Obligation by both, and ſhe diſcharged. Vide poſt. 51. Vide 1 Salk. 115. 1 Mod. 8, 135. 1 Sid. 20, 395. 2 Keb. 355 442. 6 Mod. 17, 105.

Habeas Corpus, where without Motion.

Heath againſt *Paget.*

ASSISE of a Frechold (laid) in *Weſtminſter*, of the Office of Keeper of the Writs and Records of this Court, and ſhews it to be an ancient Office grantable by the Chief Juſtice to any Perſon for Life, to be exerciſed by himſelf or his ſufficient Deputy; and that the Office being void, *Heath* Chief Juſtice, granted

Aſſiſe of an Office in *B. R.* S. C. 2 Keb. 3. 13, 19, &c. 1 Sid. 40. Palm. 285.

granted it to the Plaintiff: The Defendant prays a Day for excepting to the Writ, and had it; and then took an Exception *(viz.)* That the Writ being ſued in the Times of the late Troubles, was by Security and Pledges, whereas the Writ in *Latin* is *Pone per vades & Plegios*, and *Vades* is Sureties: And for this Exception the Writ was abated by Conſent. But as I have heard, this Exception was over-ruled in the Common Pleas the laſt Term: And note, the Writ in the *Regiſter*, 169. *b.* is *Pone per vadium, &c.* and in *F. N. B.* 177 it is *Pone per vad', &c.* which may be *Vades* or *Vadium*; and thereupon a new Writ was brought, returnable this Term, in *Latin*, and the Tenant prayed a Special Imparlance (with) *Salvis, &c.* until another Term: But by *Twyſden* Juſtice, This is againſt an Officer of the Court, who ought to be always preſent (in Court) and this Writ is (to be) a ſpeedy Remedy; and thereupon Time was given to the Defendant for excepting to the Writ, but not till another Term, but to another Day in this Term: and then the Exception was, That the Writ in the Teſte was *Duodecno* of this King, for *Duodecimo*, and this was prayed to be amended, it being only an Error of the Clerk (or Writer) and cited 8 *Co.* 160. 1 *Cro. Turner* againſt *Palmer* in a *Quare Impedit Eccleſia* for *Vicaria* amended. *Hob.* 118. *Brickhead* againſt the Archbiſhop of *York*, in a *Quare Impedit vaccaria* for *vicaria* amended, the Inſtructions being right. And *Hob.* 249. in Ejectment; *Diviſit* for *Dimiſit* in the Writ was amended: But on the other Side were cited *F. N. B.* 14. *Hob.* 128. *Oglethorpe* againſt *Maude*, 9 *H.* 7. 17. 5 *Co.* 121. Alſo, this is the Subſtance of the Writ, *viz.* the Date, and it is the Ignorance of the Clerk in not duly dating the Writ: And as to that which is ſaid in 8 *Co.* 159. *b.* That falſe *Latin* in Writs is not amendable, but a Word that is no *Latin* is, *Twyſden* and *Wyndham* Juſtices ſaid, That the Contrary thereof had been oftentimes adjudged, and the Difference is, If the Word be of the Subſtance of the Writ, be it (either) falſe *Latin* or no *Latin*, it is not amendable; but if it be not of the ſubſtance of the Writ it is amendable, be it falſe *Latin* or no *Latin*; and this Word, *viz.* the Date, is of the very Subſtance of the Writ, for if it has no Date it is not pleaded in another

Day given for excepting to the Writ. P. 2 Vide 6 Co. 27. b. Hob. 129. Litt. 81. Dyer 55, Godb. 381. Exception.

Officer ought to be always in Court.

A Writ ill in the Teſte by an inſenſible Word is not amendable, Vide 1 Salk. 51. 52. 6 Mod. 164, 265. 1 Danv. 335 Vide ib. 354. No. 38.

Difference.

another Aſſize. And for this Fault only the Writ was abated by the whole Court, divers other Exceptions of leſs Force being over-ruled: And after in *Trinity* Term on a new Original brought the Aſſize was tried here at Bar, and Verdict and Judgment for the Tenant.

* *Talbot* againſt *Bacon*. * P. 3

TRESPASS (was brought) by the Huſband and Wife, for a Beating of the Wife, and taking the Goods of the Huſband; and on Not guilty (pleaded, *&c.* a Verdict was for the Plaintiff for the Beating, and for the Defendant for the Reſidue: And it was moved in Arreſt of Judgment, That the Action was not well brought as to the Goods, and the Severance (thereof) by the Verdict had not cured it; and cited *Hob. Revel* againſt *Gray*, and 2 *Cro. Buckley* againſt *Hales*. And Judgment was ſtayed, no Body appearing on the other Side.

Battery by Huſband and Wife, and taking of Goods not cured by a Verdict, finding Not guilty as to the Goods. Vide Hob. 184. 2 Cro. 665. Noy's M. 8. Caſe 17. Hard. 166. Ld. Raym. 1208. Buller's N. P. 20. 1 Com. Dig. 108, 576.

Hudland againſt *Povy*.

S. C. 1 Keb. 127, 167.

IN Debt on an Obligation, the Defendant demands *Over* of the Condition, which was to perform Covenants in an Indenture, and then pleads, That there were not any Covenants in the Indenture; whereupon the Plaintiff demurred and prayed Judgment, (for that if there were no Covenants the Obligation is ſingle) and had it, except Cauſe (ſhewn, *&c.*)

Obligation to perform Covenants, and no Covenants pleaded. Vide poſt. 77, 45. Raym. 27. 1 Sid. 105, 308, 456. 1 Mod. 35. 2 Mod. 285. 1 Keb. 130, 451.

Daye againſt *Webb*.

IN *Aſſumpſit* the Plaintiff declares, That in Conſideration of, *&c.* the Defendant promiſed to purchaſe ſuch Lands at the beſt Rate that he could, and aſſigned a Breach, that the Defendant had not purchaſed the

Aſſumpſit to purchaſe at the beſt Rate he could. Vide 3 H. 4. 14. 11 H. 6.

18. 20 H. 6. 27. 3 H. 7. 14. 17.

Lands; on which the Defendant demurr: And it was now argued for him, that the Declaration is not good, not having averred that he could purchaſe them: And *Twyſden* Juſtice held, the *Aſſumpſit* or Promiſe abſolute, and that he had taken upon him to purchaſe them abſolutely, but that the price was to be ſo reaſonable as he could. (But by) *Foſter* Chief Juſtice, he hath not undertaken to purchaſe them except the Owner will ſell; and he is only to purchaſe them at the beſt Rate that he can, and therefore he is not to purchaſe them if he cannot. But Judgment was ruled for the Plaintiff, except Cauſe (ſhewn.)

Vide 1 Jo. 179. Yelv. 24. 1 Roll. Rep. 459. Quære 3 Lev. 244 Poſt, 98, 103, 198, 110, 111.

P. 4

* *Manby* and *Richards* againſt *Scott*.

Whether the Wife's Contract ſhall bind the Huſband or not. S. C. 1 Mod. 9, 124, to 243. 1 Keb. 69, 80, 87, 206, &c. 1 Sid. 109, 425. 1 Vent. 42. 2 Vent. 155. Vide 1 Salk. 116, 118, 189. 6 Mod. 239. Allen 62. poſt 6, 7

IN *Aſſumpſit* on (Iſſue) *Non Aſſumpſit*, a Special Verdict at *Guild-Hall*, before *Mallet* Juſtice, found, that *Scott*'s Wife departed from him without his Conſent, and lived twelve Years ſeparate from him, and then returned; but he then would not receive her, nor allow her any Maintenance, and diſcharged (or forbid) Tradeſmen, particularly the Plaintiffs, from truſting her with any Wares: And that the Plaintiffs being Mercers, ſold the Wife Wares to the amount of 40 *l.* and that the Prices were reaſonable, and the Things fit for her Quality; and if the Huſband was obliged to pay for them they found for the Plaintiff, and if not for the Defendant.

This Caſe was argued at the Bar three ſeveral Times firſt by *Alleyn* for the Plaintiff, and *Wylde* for the Defendant; Secondly by *Finch*, for the Plaintiff, and Serjeant *Beare* for the Defendant; and thirdly by *Jone* for the Plaintiff and Serjeant *Baldwin* for the Defendant and afterwards by all the Judges at the Bench, *viz. Foſter*, Chief Juſtice, *Mallet*, *Twyſden* and *Wyndham*. And the whole Court agreed, That the Verdict was ſufficient, though it did not find what the Goods were for although what are fit and neceſſary, is to be tried by the Court, yet it is that Court before which the Cauſe is tried, and not the Court here before which

come

comes to be adjudged on the Special Verdict: And that theſe Goods were fit for her Quality is agreed by (both) the Jury and the Court where the Cauſe was tried. But whether the Huſband ſhould be charged the Court was divided in Opinion; *Twyſden* and *Mallet* held that he ſhould be charged; for when ſhe returned to her Huſband, and he would not receive her, nor provide a Maintenance for her, if no Body would truſt her (ſo as) to charge the Huſband, ſhe muſt ſtarve, for ſhe cannot earn her Living by her Labour, for whatever ſhe gains by her Labour the Huſband ſhall have; and therefore of neceſſity ſhe muſt be truſted, and the Things being neceſſary for her Living, the Huſband ought to be charged for them, and the Huſband's prohibiting (forbidding) the Plaintiffs to truſt her, cannot deprive her of the Liberty which the Law gives her for Preſervation of her Life; for the Law for Neceſſity diſpenſes with Things which otherwiſe are not lawful to be done, as to throw down my Neighbour's Houſe * for preventing the ſpreading of Fire, to throw Goods out of a Boat when it is overladen, and the like; and they agreed the Caſe put by *Fineux*, 21 *H.* 7. 40. That the Wife cannot provide Bread for the Family (ſo as) to charge the Huſband: But here the Proviſion is neceſſary for the Maintenance of her own Life; and though Alimony be recoverable in the Spiritual Court, yet if the Huſband be obſtinate, and will not obey their Sentence, how ſhall the Woman live? And if he will obey it, yet how ſhall ſhe live in the mean Time? And (as to) the Caſes cited at the Bar of Writs to the Sheriff, for delivering to the Wife reaſonable Eſtovers, thoſe were in Time of *H.* 8. and (have been) long Time diſuſed. And *Twyſden* Juſtice held, That in this Caſe the Plaintiffs might have Trover againſt the Huſband for the Goods, if the Contract be void, which all the others denied; the Goods being delivered (by the Plaintiff) and (he) not to rehave them: And the ſaid two Judges held, That as the Huſband ſhall be bound in Treſpaſs for a Treſpaſs done by the Wife, or (in) Trover for Goods taken by the Wife, ſo he ſhall be here for Goods ſold to her or relief of her Neceſſity; and to maintain the Opinion for the Plaintiffs, were cited 20 *H.* 6. 26. *Dyer* 234. 11 *H.* 6. 30. Alſo 10 *Co.* Biſhop of

* P. 5

1 Vide 1 Sid. 113. 128, 129. 2 Vent 45. 1 Mod. 136. 137. 1 Vent. 34. Noy 79. 126. 1 Jo. 16, 443. March 60, 82. Larch 126. 1 Leon 312. Palm. 343. Cro. Jac. 661. Style 18. Yel v. 166.

Cro. Car. 254, 255, 494. Andr. 242. 1 Roll. Abr. 6 pl. [illegible] Stra. 1094. 1 Sa[illegible] 114, 115 1 C[illegible]n. Dig. 220. 5 Com. Dig. 194. Vide 1 Salk. 113, 116, 118.

of *Salisbury*'s Caſe, That a Biſhop may grant an Office of Neceſſity notwithſtanding the Statute. And 9 *Co.* 73. A Feme covert excuſed in a Raviſhment of Ward for Neceſſity, becauſe ſhe has nothing to pay; and it is no Advantage to the Huſband, for he is charged only for Neceſſaries, and thoſe he muſt have provided if the Wife had continued with him, and divers other Matters were ſaid, and divers other Authorities cited on this Side.

But of the contrary Opinion were *Foſter* and *Wyndham*, and on this Part it was argued, That the Huſband ſhall not be charged; for when ſhe departs from her Huſband againſt his Will, and remains ſo long abſent, and returns again at her own Pleaſure, the Huſband ſhall not be obliged to maintain her after her Return, any more than when ſhe was abſent; for if it were ſo, Wives might leave their Huſbands in their Youth, and return in their Old Age, when they cannot be ſo aſſiſting to their Huſbands as before; and their Society, Aſſiſtance, and Comfort to their Huſbands is one Conſideration of their Maintenance: A Feme covert cannot make any Contract to charge her Huſband without (his) Aſſent, precedent or ſubſequent, expreſſed or implied; they did not deny, but that as Circumſtances * may be, an expreſs or implied Aſſent of the Huſband may appear to a Jury, ſo that the Contract of the Wife may be the Contract of the Huſband; as if the Goods come to his Houſe, or he appears well content with the Uſe of them; but here the contrary appears, for the Plaintiffs were forbid by him to ſell to (or truſt) his Wife, and it does not appear that he ever had Knowledge of this Sale, and ſo could not approve thereof; and the Jury having found only the Forbidding and the Sale, the Court is obliged to adjudge according to the Law, That the Contract is void, for a Feme Covert has not Power of her ſelf to make any Contract: And it is not like to the Caſe of Infants, for their Contracts are to ſome Intents good, and may be made good by them at their Age; but the Contracts of Feme coverts are abſolutely void, for they have not any Power or Wills, but (are) ſubject to the Will of their Huſbands; every Man may trade with what Tradeſman he will,

1 Salk. 116.

*P. 6

Feme coverts.

Infants.

will, exclusive of all others; but by this Means they shall (be forced) against their Will to trade with such as their Wives please. And the Laws of *England* have provided for Wives more reasonably than to make them their own Carvers *(viz.)* To go to the Ordinary for Alimony, the Costs of which Suit the Husband shall pay, if the Wife hath just Cause of Complaint. 1 *Cro. Green's* Case, and to supply it in Case of the Husband's Obstinacy, 8 *H.* 3, *Rot. Claus. Memb.* 19, *vel.* 39. *Fretchingfield's* Case, & 4 *H.* 3. *Rot. Claus. Memb.* 3. where the Husband was obstinate, Writs *de Estov. habend.* where directed to the Sheriff to levy Estovers, (*i. e.* Maintenance) for the Wife, of the Husband's Goods, which Cases though ancient, are still Law, although the Law has now provided another Remedy against the Obstinacy of the Husband, by *Excom. Capiendo.* And in Maintenance of the Opinions on this Side, were cited 21 *H.* 7. 40. That she cannot charge her Husband for Victuals bought for the Family without his Command precedent, or Assent subsequent. *F. N. B.* 120. *G.* The Contract of the Wife shall not charge her Husband (any) more than the Contract of the Servant. 4 *Co. Forse* and *Hemling's* Case, she can neither make a Will, nor revoke a Will made before Marriage, because she has no Will, and therefore the Marriage is a Revocation, for else the Will would be irrevocable. 2 *Cro.* 640. *Tracy* against *Dutton* her Receipt after Marriage of the Rent of her own Land, shall be no Discharge against the Husband, although the Tenant had no Notice of * the Marriage, 31 *E.* 1 Tit. *Debt.* 663. & 3. 20 *H.* 6. 22. 27 *H.* 8. 24, 25. 13 *R.* 2. Tit. *Annuity* 50. And those Judges held the Prohibition (or forbid doing) by the Husband (to be) material. * P. 7

But the Court being thus divided, the Cause for the great Weight thereof, was adjourned into the Exchequer; and there, after divers Arguments at the Bar, it was solemnly argued by all the Judges severally at several Days at the Bench, where *Tyrrell*, Justice of *Com' Banco*, joined in Opinion with *Twyden* and *Mallet*; all the rest, *viz. Bridgman*, Chief Justice of *C. B. Hale* Chief Baron of the Exchequer, *Hide* and *Brown* Justices of *C. B.* and *Atkyns* and *Turner* Barons of the Exchequer

Vide 1 Ven. 42. 2 Keb. 554. 1 Mod. 9. 1 Sid. 425, &c. ante.

Exchequer, and *Foſter* Chief Juſtice, and *Wadham Wyndham* Juſtice of the King's Bench agreed, That the Huſband ſhould not be charged, but that Judgment ought to be given for the Defendant: And ſo it afterwards was on a Motion *in Banco Regis*, and the Judgment was there entered in *Eaſter* Term, 15 *Car.* 2.

Herne againſt ———

On a *Fi. Fa.* againſt an Executor, the Sheriff returns no Goods as to the Debt, but levies the Damages of the Teſtator's Goods, it is ill; and all ſubſequent Proceedings thereon are alſo ill. Vide 3 Lev. 100. 1 Sid. 317. Hob. 4. Yelv. 18, 33. Cro. El. 592, 734, 822. Latch. 140. Palm. 443. 2 Cro. 4, 394. Mo. 246, 689. 1 And. 85, 160. Doug. 4. 2 Bac. Abr. 401, 443. 1 Term. Rep. 691. 2 Term. Rep. 126.

A *Scire Facias* againſt an Executor, with a *Fieri Facias* for levying the Debt and Damages *of the Teſtator's Goods, if ſo much* (in his Hands) and *if not*, then Damages *of his own Goods*: The Sheriff returns, That the Executor had not Goods to ſatisfy the Debt, but that he had levied the Damages of the Teſtator's Goods; whereupon iſſued another *Fieri Facias*, ſurmiſing that the Defendant had waſted the Teſtator's Goods, on which the Sheriff returns, that he had waſted the Goods: And this was traverſed and tried, and Verdict for the Plaintiff, and on Motion in Arreſt of Judgment, it was ſtayed by the whole Court, for (that) the Return of the Writ was ill; for the Goods of the Teſtator ought to be charged with the Debt, and not with the Damages, except they are ſufficient to ſatisfy both, but the Damages are to be levied on the Goods of the Executor for the Delay; and although that the Trial and Verdict be on the Return of the ſecond Writ, and the firſt admitted (to be) good, and accepted by the Plaintiff, and that it is the Advantage of the Defendant to have the Coſts levied of the Teſtator's Goods, yet all the Proceedings on the ſecond Writ being founded on the Return of the firſt, which is ill, all is ill. And by the whole Court Judgment was ſtayed.

* P. 8

* The King againſt *Ward* Executor of *Wentworth*.

Felo de ſe, is not Murder within the Exception of Murder in a

IT was found by an Inquiſition on a Writ directed to the Sheriff, That *Wentworth*, of his Malice forethought, murdered himſelf; and this Writ iſſued after

after the Reſtoration of King *Charles* II. but the Murder was done long Time before. And now the Queſtion was, Whether by the General Pardon of all Offences, Forfeitures, *&c.* except Murder, this Murder was pardoned, or excepted, ſo that the King ſhould have the Goods? *Foſter* Chief Juſtice, and *Mallett* (ſaid) This is a fact excepted out of the Act by the Exception of Murder, and that a *Felo de ſe* is a Murderer in the higheſt Degree: And divers Precedents were produced where it had been ſo taken; but all (of them) being *ſub ſilentio*, *Twyſden* and *Wyndham* held the contrary: They ſaid, That *Felo de ſe* and Murder are diſtinct Things, and diſtinctly treated of by all Authors; and the Reaſon why Murder is excepted out of all Statutes, is not becauſe it is a *Moſaical* Law, but a patriarchal Law inforced by Nature, that none ſhall deſtroy himſelf; but that the Vengeance of Blood is *Moſaical*, and given only upon the Murder of another: But in the Caſe of *Felo de ſe* no Vengeance of Blood can be, but only a Forfeiture of Goods given to the King for the Offences which he has done to the Law of Nature, and depriving the King of a Subject; and the Meaning of the Exception of Murder out of Pardons is, (in order) for putting the Murderers to Death, which cannot be in this Caſe; and ſo the Court was divided in Opinion: But afterwards *Mallett* being withdrawn from his Place, *Kelynge* coming in his Room, joined in Opinion with *Twyſden* and *Wyndham*, and gave (his) Opinion, That this Murder was pardoned, and not excepted by the Exception of Murder; and ſo was the Forfeiture for it alſo, the Offence (itſelf) being pardoned: But where it was argued at the Bar, that the Pardon being before the Inquiſition, and ſo before the Goods came to the King, ſhould enure to the Executors as a Releaſe, though that the Offence had not been pardoned; it was denied by all the Juſtices; for the King's Title was before the Inquiſition, and the Goods forfeited to him immediately by the Fact.

Pardon. S. C. 1 Sid. 150, 167, 264. 1 Keb. 66, 548, 628. Vide 2 Mod. 53. 1 Saund. 361 poſt 26. 140.

Q. Bracton.

Goods of *Felo de ſe* are forfeited before the Inquiſition. Vide 2 Sid. 115. 1 Jo. 203. 1 Vent. 193. 1 Salk. 108, 159. poſt 33. 2 Lev. 49.

The

* P. 9

* The King againſt *Read.*

No new Trial on a Defendant's Acquittal in Criminal or Capital Caſes; otherwiſe on a Conviction. Vid. 1 Sid. 143 153. 1 Keb. 124, 127, 138, 198, 213, 214, 233. Raym. 34. Vide poſt 124. 1 Sid. 153, 154.

INDICTMENT of Perjury, and the Defendant acquitted, motion was for a new Trial for the King, for that divers Witneſſes were abſent, *Wyndham* Juſtice held it grantable, it not being touching Life; to which it was anſwered, That new Trials may be in criminal Caſes at the Prayer of the Defendant, where he is convicted (but) not at the Suit of the King where he is acquitted, no more in criminal Caſes than in Capital; and whereas two Caſes were cited, wherein new Trials had been (granted) on the King's Behalf: *Twyſden* ſaid, That was in the late troubleſome Times, and by the Parties Aſſent; and thereupon the Court would adviſe and gave Time for ſearching Precedents.

Note, That afterwards in *Michaelmas* Term, 13 *Car.* 2. between the King and *Bowden*, an Information of Perjury, and the Defendant acquitted, and Motion was, for a new Trial on Affidavit, That one of the Witneſſes was abſent by reaſon of Sickneſs; and denied by the Court: (For) the Party being acquitted, cannot be tried again; but after a Conviction, a new Trial may be had for the Defendant on good Cauſe: And in *Trinity* 15 *Car.* 2. The King againſt *Fenwicke* and *Holt*, Information for Perjury, and the Defendant acquitted, Motion was for a new Trial, on Affidavit that ſome of the Witneſſes were kept away by Practice of the Defendant; And *Wyndham* Juſtice held it grantable, being in a Caſe only criminal, and not capital: (But) *Kelynge* ſaid, No Caſe could be ſhewn of a new Trial in a criminal Caſe, more than in a capital; for the Fame of the Defendant ſhall not be often drawn in Queſtion for the ſame Thing, no more than his Life. And *Foſter* and *Twyſden* directed an Information to be brought for the Practice, and if it were found a new Trial ſhould be granted; to which *Wyndham* Juſtice agreed: And this Caſe being moved again in *Michaelmas* 15 *Car.* 2. *Foſter*, *Twyſden* and *Kelynge* continued their Opinions; (But) *Wyndham* was contrary, and ſaid That in an Information for the Practice he would not have

S. C. Sid. 149, 153. 1 Keb. 546, 568, 590, 638, 639, 697.

have the ſame Puniſhment that he would have for the Perjury, and therefore held a new Trial grantable. The *others* (ſaid) The Courſe of the Court is the Law of the Court, and better it is that an * innocent Perſon ſhould ſuffer than the Law changed. And *Note*, In *Hillary* Term, 15 & 16 *Car.* 2. in the Caſe of Sir *John Jackſon*, where he conveyed away the Witneſſes in an Indictment of Parjury, an Information was brought againſt him for the Practice, and he convicted and fined 1000 Marks; and then as I ſuppoſe a new Trial was granted, the Information being brought by the Direction of the Court to that Intent; but I did not hear any Rule for a new Trial given at the Time.

* P. 10
Vide poſt, 124. 2 Show. 1, 2, 3.

See 2 *Jo.* 163. and 2 *Show.* 165. *Rex verſus Smith*, a new Trial after a Verdict for the King, on an Information for Perjury.

Term

Term. Sanct. Hill.

ANNO

12 & 13 Car. II. in Banco Regis.

Plunket againſt *Holmes*.

Intrat. Hill. 1658. B. R. Rot. 521.

Deviſe to one for Life, and if he die without Iſſue living at his Death, Remainder to another in Fee; *Quære* If any executory Deviſe, or a Contingent Remainder?
S. C. Raym. 28.
1 Sid. 47.
1 Keb. 29, 119.
2 Danv. 519, 15.
1 Salk. 224, 225.
Vide 4 Mod. 282. 3 Lev. 208, 434.
1 Salk. 228, 233.
2 Danv. 520.
Fearne Con. Rem. 207, 303, 432.

IN Ejectment, Not guilty (was pleaded) and a Special Verdict (found) on which the Caſe was, A Man ſeiſed in Fee, deviſed the Land to his eldeſt Son *Thomas* for Life, and if he dies without Iſſue living at the Time of his Death, to *Leonard*, another Son, and his Heirs; but if *Thomas* had Iſſue living at his Death, that then the Fee ſhould remain to the right Heirs of *Thomas* for ever: *Thomas* enters after the Deviſor's Death, and ſuffers a Common Recovery (under which the Defendant claims) and dies without Iſſue; whereupon *Leonard* enters and makes the Leaſe to the Plaintiff. This Caſe was argued twice in this and the following Term, by *Scroggs* and *Alleyn* for the Plaintiff, and *Jones* and *Finch*, the King's Solicitor, for the Defendant, and two Queſtions (were) made. 1. If *Thomas* had by the Will only an Eſtate for Life by the Deviſe, with a contingent Remainder to *Leonard*, or whether the Fee was veſted in *Thomas*, with an Executory Deviſe to *Leonard*? 2. If it be an executory Deviſe to *Leonard*, if the common Recovery has barred

red it? And for the Plaintiff it was argued, That *Thomas* had a Fee, for though only an Eſtate for Life be deviſed to him, yet by Diſcent of the Reverſion the whole Fee was in him, which merged his Eſtate for Life, and this is executed in him; and then the Eſtate to *Leonard* cannot be any other than an executory Deviſe, for when the whole Fee is given or veſted in one Perſon, with a Limitation of a Fee to another upon a Contingency, this cannot be a Remainder, for one Fee cannot remain * upon another, but of Neceſſity muſt take Effect as an Executory Deviſe: But when only Part of the Eſtate is diſpoſed, as for Life, or in Tail, and the Reſidue given to another on a Contingency; as to the right Heirs of *J. S.* who is in Life, or to ſuch (a Perſon) as ſhall be living in the Houſe at ſuch a Time, this is a contingent (Remainder) But here the whole Eſtate is in *Thomas*, either by the Deviſe or by Diſcent, and then the Deviſe to *Leonard*, muſt of neceſſity be an Executory Deviſe which being to happen within the Compaſs of a Life, has been allowed; as in *Pell* and *Brown*'s Caſe, 2 *Cro. &c.* And as to the ſecond (Queſtion) they alſo relied on *Pell* and *Brown*'s Caſe, where it is adjudged, That a Recovery ſhall not bar in ſuch Caſe. But on the other Side it was argued, and ſo reſolved by the whole Court in *Michaelmas* Term, 13 *Car.* 2. That *Thomas* took but an Eſtate for Life by the Will, and the Remainder to his Heirs not executed; and though he be the Heir to whom the Reverſion deſcends, that ſhall not drown the Eſtate for Life contrary to the expreſs Deviſe and Intent of the Will, but ſhall leave an Opening as they termed it, for the interpoſing of the Remainders when they ſhall happen to interpoſe between the Eſtate for Life and the Fee; and (they) compared it to *Archer's* Caſe, 1. *Co.* where though *Robert* the Deviſee for Life was Heir, yet the Remainder to his next Heir Male was contingent, and ſo not an Eſtate for Life merged by the Diſcent of the Reverſion: And ſo the Eſtate of *Thomas* here being only for Life, by this Deviſe the Remainder to *Leonard* was a contingent Remainder, and barred by the Recovery; and then the ſecond Point will not come in Queſtion, whether an Executory Deviſe ſhall be barred by a Common Recovery. But on the

* P. 12

Cro. Jac. 15. 1 Roll. Abr. 611, 835. 2 Roll. Abr. 394. Vide 1 Lev. 290. 3 Lev. 22, 23. 2 Danv. 525. 3 Chan. Caſes 18, 19, 50.

the firſt Point they all gave Judgment for the Defendant.

Anonymous.

Cuſtom to take Apprentices laid in the *ſolet* only: S. C. 1 Keb. 376, 469, 512.

COVENANT (was brought) and declared on the Cuſtom of *London:* That Time out of Memory, *&c.* every Freeman (*ſolebat*) hath uſed to take Apprentices, who by the ſame Cuſtom have uſed to be bound by their Covenants to ſerve faithfully; and that the Plaintiff took the Defendant Apprentice by Indenture, whereby he covenanted to ſerve the Plaintiff for ſeven Years, and that he had not done it, but had departed from his Service without Licence. And on Iſſue, That he had * ſerved him according to the Covenants, and had not departed: Verdict was for the Plaintiff; and it was moved in Arreſt of Judgment by *Jones*, That the Declaration being in the *Solet* only, and not in the *Debet* and *Solet*, is not good; and cited 22 *E.* 4. 8. and 1 *Cro.* the King and *Bagſhaw*. And if he be obliged by the Covenant to ſerve at all, being an Infant, it ought to be by the Cuſtom. To which it was anſwered and reſolved by the Court, That the Action being founded on the Covenant, and the Cuſtom (being) but Inducement, it is ſufficient: And gave Judgment for the Plaintiff, *Niſi, &c.*

* P. 13

6 Mod. 312, 313. 2 Show. 446.

Radford againſt *Bludworth.*

One does an Act of Bankrupcy, and ſells the Land, and five Years after does another Act, on which a Commiſſion iſſues. S. C. 1 Keb. 11. 2 Sid. 96, 114, 176. Vide poſt, 17.

IN Ejectment a Special Verdict (found) A Merchant ſeiſed of Lands, and indebted, in 1643 committed an Act of Bankruptcy; and in 1645 was outlawed, and in *July* 1649, ſold the Lands to the Leſſor of the Plaintiff; and in 1649 was outlawed again. In 1653, a Commiſſion of Bankrupcy was ſued and in 165⁻, he declared a Bankrupt; and the Commiſſioners ſold the Lands to the Defendant, who entered and gained Poſſeſſion, on which the Leſſor brought the Ejectment. And *firſt*, it was objected, That the Commiſſion not being ſued within five Years after 1643, ought not to have iſſued at all;

for when the Statute of 21 *Jac.* reſtrains the ſuing of the Commiſſion to five Years after the Act of Bankruptcy committed, it ought to be intended the firſt Act of Bankruptcy. But all the Court were againſt this, (and that) it might be ſued within five Years after an Act of Bankruptcy. *Secondly*, It was objected, That the Verdict was inſufficient, not having found that he permitted himſelf to be outlawed, with Intent to defraud his Creditors; as the Words of the Statute are, and he may be outlawed without his Knowledge. To which *Finch* at the Bar anſwered, That in a Special Verdict it ſhall be ſo intended. But *Thirdly*, The principal Queſtion was, Whether by the Commiſſion iſſuing in 1653, and he being found a Bankrupt thereon, it ſhould now relate to the firſt Act of Bankruptcy committed in 1643; ſo that the Sale by the Bankrupt in 1648, ſhould be now defeated by the Vendees, by Reaſon of Acts of Bankrupcy done in 1643, or in 1645; which were more than five Years before the Commiſſion ſued? And it was reſolved by all the Court, That the Sale ſhall not be defeated by any Act of Bankruptcy made before * the Sale, if the Act was not made within five Years before the ſuing of the Commiſſion: For if a Man does an Act of Bankruptcy in 1654, and continues in Poſſeſſion till 1658, and then ſells, and after commits another Act of Bankruptcy; and in 1660, a Commiſſion is ſued, the Vendee is ſafe, no Commiſſion being ſued within five Years after the Act of Bankruptcy made in 1654; for the Act to avoid the Purchaſe muſt be done within five Years before the Commiſſion, and alſo done before the Sale.

* P. 14 Bankrup y. poſt, 18. 2 Shove. 453, 512.

And in *Eaſter* Term 16 *Car.* 2. a Man did an Act of Bankruptcy in 1651, and in 1657, did another Act; and in 1658, made a Leaſe of Lands: In 1660, a Commiſſion iſſued, on which he was found a Bankrupt, and the Lands ſold, and there it was again reſolved, That the Commiſſion was well ſued within five Years after the laſt Act; although not within the five Years before the Commiſſion, and alſo before the Leaſe, the Vendee of the Commiſſioners ſhould avoid the Leaſe; Which I myſelf heard and obſerved.

Mayor

Mayor and Commonalty of *London* againſt *Bernardiſton*

Return on a *Habeas Corpus* to the City of *London*.
S. C. 1 Keb. 32, 35, 39.
3 Sid. 178.
Vile 6 Mod. 122.
1 Sid. 284.
1 Mod. 47, 48.

IT was returned on a *Habeas Corpus*, That *London* is an ancient City, and that Time out (of Mind,) &c. there had been an ancient Beam, called the *King's Beam*, mantained by the City; to which all Foreigners have uſed to bring all their Goods uſually ſold by Weight to be weighed, and their Cuſtom to make By-Laws, and a By-Law, (made) That every Foreigner who ſells any Goods uſually ſold by Weight without bringing them to the Beam to be whighed, ſhall pay 13*s.* 4*d.* for every five hundred Weight, to be recovered by the Chamberlain in the Sheriffs Court, and not elſewhere; and that no Eſſoin, Protection, &c. ſhall be allowed: And that *Bernadiſton* being a Foreigner, had 3300 weight of Raiſins, things uſually ſold by weight, without bringing them to the ſaid Beam to be weighed; and for this Forfeiture he was ſued in the Sheriffs Court; and this is the Cauſe of the Impriſonment. And on this Return divers Exceptions were taken and argued this Term and the Term enſuing, at divers Times, by *Jones*, *Clyn*, and *Becus*, for the Defendant * *Bernardiſton*; and by *Finch* the King's Solicitor, *Wylde* the King's Serjeant, and *Allen* for the Mayor and Commonalty. The *firſt Exception* was, That the By-law for bringing all Goods uſually ſold by weight was unreaſonable; for they are oftentimes ſold by Lump, and then (there is) no need of weighing; and to put all Foreigners to this Charge, Trouble and Attendance to no Purpoſe, was unreaſonable; but if it had been, That all Goods when they are ſold by weight ſhould be brought to the Beam and weighed, it might be to ſome Purpoſe, for preventing falſe Weights; and compared it to the Caſe in *Mich.* 1 54; between *Alunt* and *Janon*, where a Cuſtom to grind all the Grains ſpent in his Houſe was void; for he may uſe Grain there without grinding: But if it had been to grind all grain ground and ſpent at his Houſe, it might be good. But to this it was anſwered, and at length reſolved by the Court, That the By-Law was good, for this By-Law was founded upon the Cuſtoms of *London*, which are of ſuch Force, that they ſhall

* P. 15

By-Law to bring all Things ſold by weight to the City Beam.

Preſcription to grind all Grain ſpent in their Houſe at ſuch a Mill.

ſhall ſtand againſt negative Acts of Parliament; as where *Magna Charta, cap.* 36. ſays, *It ſhall not be lawful for any to give Lands in Mortmain,* yet they might alien in Mortmain before their Charter of 7 *R* 2. as appears by 45 *E.* 3. 36. And this Cuſtom was reaſonable in any place, for it is of great Uſe for preventing of falſe Weights between the Buyer and Seller, and it is alſo of great Uſe for preventing Deceit in the King's Cuſtoms, by comparing the Weight entered at the Cuſtom-Houſe with the Weight at the Beam, and ſuch Deceits are moſt uſually committed by Foreigners; and though that in Truth they ſell their Goods by weight at their Houſes, they may ſay that they ſold them by Lump. And *Twyſden* ſaid, That the City had (an) Intereſt in their Beam, and are at Charge to maintain it, and for Servants to attend the Weighing; and therefore 'tis Reaſon that they ſhould be compelled to weigh, and to pay for it, notwithſtanding among themſelves they agree by the Lump. 2*d Exception,* That the By-Law was unreaſonable in reſpect of the Penalty and Inequality thereof, for perhaps ſome of the Goods are not of the Value of 13*s.* 4*d.* the 500 Weight, and others of the Weight of 500 Pounds, may be of the Value of 500*l.* And *Coke,* in his 8 *Rep.* 147. ſays, By Laws with unreaſonable Penalties are void: But to this 'twas reſolved, That the By-Law was good notwithſtanding this Exception, for the * By-Law ought to lay the Penalty on the Weight, for that is the Thing provided for; beſides, it would be endleſs to put the Penalty on the Value, and alſo uncertain: And the Penalty is only a Means to compel obedience, which every one may avoid who will bring his Goods to be weighed; and a Caſe was cited in *Sutton*'s Caſe in this Court, in 1652. where a By-Law to pay a Mark for a Truſs of Hay ſold unweighed, was adjudged good: And *Oſborn*'s Caſe, where a Penalty of 40*s.* for uſing of a Cart was adjudged good, though perhaps he did not gain 4*s.* by it, becauſe the Penalty is but to inforce Obedience to the Law, but if it had been to pay a great Sum for the weighing, it might be otherwiſe. 3*d Exception,* That this By Law took from the Subjects divers Privileges that the Law allows, as Eſſoines, *&c.* But this Exception was diſallowed, for it is generally ſo in all By-Laws; and ſo it was in *Waggoner*'s Caſe, 8 *Rep.* 4. 4*th Exception,*

Cuſtoms of *London* againſt negative Statutes, 2 Lev. 106, 142, *&c.*

By-Laws with great Penalties, *&c.* when good, and when not. Vide 1 Salk 142, 397.

* P. 15

Penalty on the Quantity and not the Quality.

By-Law, that no Eſſoin, *&c.* good.

So, that the Penalty ſhall be recovered in the City-Court only.

That the By-Law reſtrains the Action to their own Courts: But this Exception was alſo over-ruled, for there the Facts and the Perſons are beſt known. 5*th Exception*, That it does not appear that he had Notice of the By-Law, and he is a Foreigner, who cannot take Notice of their By-Laws, nor is any appointed to give Notice, nor any Publication of the By-Law appointed: But hereto 'twas anſwered, That this By-Law is growing (ſpringing) out of the Cuſtom, and every Man who will trade in *London*, ought to take Notice of the Cuſtoms of the City, which are the Laws of the City; and afterwards in *Eaſter* Term, 13 *Car.* 2. a *Procedendo* was awarded, except better Cauſe (ſhewn) within three Days.

Notice thereof not neceſſary. Vide 2 Lev. 106, 142, 174, 245, 252, &c. ib. & ante 14, 15.

Tompſon againſt *Noel*:

A Plea that anſwers only to Part is ill. 1 Saund. 207, 209. Vide poſt, 81.

COVENANT brought, and declares, That the Plaintiff covenanted to go with a Ship to *D.* in *Ireland*, and there to take in 280 Men from the Defendant, and to carry them to *Jamaica*; and the Defendant covenanted to have the 280 Men there ready, and to pay for the Carriage of them 5*l.* a Man, and ſays, that the Defendant had not the 280 Men ready, but that he had 180, and thoſe he took and carried, and the Defendant had not paid for them: The Defendant pleads that he had the 280 Men ready, and tendered them to the Plaintiff, and that he would not receive them, but ſays nothing * to the carrying of 180 Men, nor to the Non-payment for them, and for that it was not a Plea to the Whole but to the carrying only, Judgment was given for the Plaintiff upon a Demurrer.

* P. 16

Bateman againſt *Harvy*.

A Trader leaves off Trade indebted. If he may be a Bankrupt for thoſe Debts, though not for thoſe contracted after.

EJECTMENT, and, on a Special Verdict the Caſe was, *Harvy* being a Merchant indebted to divers Perſons, left off Trading being ſo indebted, in 1645; in 1647 he abſconded, and a Commiſſion was ſued, and he adjudged a Bankrupt in 1653, the Debts not paid wherein he was indebted when he left off his Trade: And if he may be a Bankrupt for thoſe Debts by abſconding

ſconding in 1647, was the Queſtion. 'Twas argued by *Baldwin*, Serjeant, for the Plaintiff, and by *Brown* for the Defendant, who ſaid, That for calling him Bankrupt in 1647, when he did not gain his Living by buying and ſelling, as the Statute is, he cannot have an Action, and cited 1 *Cro. Colly* againſt *Mayne*, and 2 *Cro.* 578. *Upwike* againſt *Beks*. But the Court inclined that he ſhould be a Bankrupt as to thoſe Debts, but not as to Debts contracted afterwards. But 'twas adjourned.

Vide 1 Sid. 411. 1 Vent. 5, 29. & *quære*, 166. 2 Keb. 452, 487, &c. Vide ante 13. 1 Vent. 5, 29, 166. 1 Sid. 411 2 Keb. 453. Buller's N. P 39. Cooke's B. Laws, 72.

Boylſton againſt *Radcliff*.

DEBT on an Obligation to *Boylſton* and *Stodder*, entered in to them by *Radcliff*; and on a Special Verdict the Caſe was, That *Stodder* became a Bankrupt, and the Commiſſioners aſſigned the Debt to the Plaintiff the Co-obligee, who brought the Action, being a Creditor himſelf, and the Aſſignment being for the Benefit of himſelf and the other Creditors: If by this Aſſignment he alone might bring the Action, was the Queſtion. And 'twas argued by *Finch* for the Plaintiff, That he might, and that this was the only Means for the Recovery of the Debt; for if it had been aſſigned to another, he alone could not bring an Action on the Bond for the Moiety, and the Action ought to be brought by Virtue of the Statute in his own Name; though before the Bankruptcy it ought to be brought in the Name of the Obligee; and now the whole Intereſt is in the Obligee *Boylſton*, one * Moiety in his own Right, and the other Moiety for the Advantage of the Creditors; and therefore he alone ſhall maintain the Action in his own Name, for he is Obligee of the one Moiety, and Aſſignee as to the other, and being all one Perſon, therefore it is to be ſued by him alone; for after the Aſſignment it cannot be ſued by him and *Stodder*, and thereto *Wyndham* Juſtice inclined; but none being ready on the Defendant's Part, it was adjourned.

Obligation to two, the one becomes Bankrupt, his Part is aſſigned to the other Obligee. S. C. Raym. 6. 1 Keb. 167. Vide 1 Mod. 45. 1 Salk. 110, 111. 2 Show. 103, 238.

Vide 6 Mod. 131. Fareſt. 83, 96. 3 Lev. 69, 191.

* P. 18.

Bankruptcy ante 13, 14. 6 Mod. 131.

Weeden againſt *Baldwin.*

A Man ſeized of Soccage Land, and of the Reverſion after a Life of *Capite* Land, deviſes all the Soccage.
S. C. 1 Sid. 55. 1 Keb. 9, 14, 95, 148. Raym. 39. Vide 8 Co. 85. 4 Co. 4. a. 9 Co. 133. b. 6 Co. 76. 3 Co. 31. b. 10 Co. 81, 84. Plowd. 344. Mo. 148, 177, 341, 356, 784. 1 And. 34. Keilw. 209. Dyer 72. Aleyn 2. 55. Cro. El. 100. 1 Leon. 76. 2 Leon. 35. Ley. 66. Noy. 117. 3 Leon. 79, 29. 2 And. 21. Co. Litt. 78. a. 111, 123. 1 Bulſt. 165. Godb. 17. 1 Roll. Abr. 618. 1 Saund. 261. Vide 2 Danv. 539, to 542. 1 Sid. 85, 315, 362.

* P 19

1 Mod. 117. Raym. 89. Poph. 91. 10 Co. 83. Brownl. 103. 4 Co. 4. a. Cro. Jac. 145. Noy. 117. Cro. El. 804. 1 Saund. 239, 261.

IN Ejectment a Special Verdict (found) *Baldwin* ſeized of *Capite* Land to him and his Wife, and to the Heirs of the Huſband, and the Huſband being ſole ſeized of Soccage Land in Fee, deviſed all the Soccage Land to his Wife for Life, the Remainder to the Leſſor of the Plaintiff in Fee, and dies, the Wife ſurvives, and afterwards ſhe dies; and the Leſſor being the Deviſee in Remainder of the Soccage Land, enters and makes the Leaſe to the Plaintiff. And if this Seiſin of the Remainder of the *Capite* Land be ſuch a *having* within the Statutes touching *Capite* Land, that the Deviſe ſhall be void, as to the third Part of the Soccage Land, was the Queſtion: 'Twas argued ſeveral Times at the Bar by *Powys* and *Aleyn* for the Plaintiff, and by *Howel* and *Jones* for the Defendant: And afterwards in *Michaelmas* Term 12 (*Car.* 2.) 'twas argued by all the Judges, and Judgment given for the Plaintiff for all the Lands; and *Mallet*, *Twyſden* and *Wyndham*, held clearly, That this *having* of this dry Reverſion was not any *having* within the Statutes, which ſhould reſtrain the Deviſe of all the Lands; for as the Statutes of 32 and 34, give Power to the Subject to deviſe, they provide for the *Saving* of the King's Wardſhips, that where the Deviſor hath any *Capite* Land, he ſhall not deviſe more than two Parts of the Soccage Land, but ſhall leave one third Part thereof to deſcend to the Heir; but this was not intended to extend to any Caſe but where the Heir ſhould be in Ward; But of ſuch a dry Reverſion he ſhould not be in Ward at Common Law, and the Proviſo in 32 *Hen.* 8. which ſays, *When two hold Lands to them and the Heirs of one, and he that has the Fee dies, his Heir* **ſhall be in Ward*, is intended only as to the Body, not to the Lands; for there being in this Clauſe a new affirmative Law, it implies a Negative, and ſhall not be extended beyond the ſtrict Words; and therefore if the Heir had been within Age at the Time of the Wife's Death, the Heir ſhould be in Ward for his Body, but not as to his Lands, becauſe no Wardſhip could be of them at the Time of the Death of the Teſtator, the ſurviving Wife being the King's Tenant, and not the Remainder-Man: But *Foſter*, Chief Juſtice, with all his Force oppoſed this,

this, and ſaid, That as the Proviſo is a new Law ſo are the Statutes throughout, (they) giving Power to the Subject to deviſe his Lands, which he could not do before: But they gave this Power to deviſe with a Reſtriction, and that is, That when he had *Capite* Lands, he ſhould not deviſe more than two Parts of the Soccage; and he had in him this Reverſion, and it ſhall deſcend from him to his Heir, and therefore he ſhall be in Ward; and the Judgments, Statutes and Incumbrances of the Father ſhall bind it: He conſeſſed, that for a meer dry Remainder no Wardſhip ſhould be; but when it is a veſting Remainder, importing an immediate Advantage on the Death of the Tenant for Life, as here, there it ſhall cauſe a Wardſhip. But at length (tho' doubtingly) he agreed, That Judgment ſhould be entered for the Plaintiff, according to the Opinions of the other three.

Cart. 208. Powell on Deviſes 22.

Vide Co. Litt. 111. b. 10 Co. 81. b. 1 Sid. 55, 56. Raym. 39, 40. Hob. 80. Goldſ. 84. 3 Leon. 105.

Dr. Goddard's Caſe.

A *MANDAMUS* was moved for to the College of Phyſicians, for reſtoring him to a Fellowſhip of the College, and ſome Doubt was made, Whether a *Mandamus* would lie (for this) or for any Fellowſhip in any of the Colleges in the Univerſities? But at laſt 'twas granted, and (ſaid) That it ſhould be conſidered on the Return, whether it lies or not. And afterwards in *Trinity* Term a Return was made, whereby it appeared, that a Fellow (here) is not, as Fellow, Member of a Corporation, but is a kind of Officer, as a Manciple is to a College: And the Return (was) adjudged good, and no Reſtitution.

Mandamus for a Fellow of the College of Phyſicians. S. C. 1 Sid. 29. 1 Keb. 75, 84. Vide poſt, 23, 75. 1 Sid. 71. 1 Mod. 83, 84. 1 Keb. 14, &c.

* *Bennett* againſt *Aſtell*. * P. 20

ASSUMPSIT brought, and declares, That where the Plaintiff had undertaken, That whereas the Defendant was obliged to the Coroner in an Obligation of 1600*l.* for an Appearance; which Obligation the Coroner had authorized the Plaintiff to ſue: That the Plaintiff would not ſue it; and where the Plaintiff had an

Aſſumpſit in Conſideration that he hath undertaken to do a Thing, is a Promiſe againſt a Promiſe, and Performance need

not be averred. 1 Keb. 333. Vide poſt, 27. 70, 77, 87, 164, 293.

an Outlawry againſt *A.* for 400*l.* that (if) the Plaintiff would permit the Defendant to take the Advantage of the ſaid Outlawry againſt *A.* to pay to the Plaintiff 400*l.* and avers that he had admitted the Defendant to take the Advantage of the ſaid Outlawry againſt *A.* yet the Defendant had not paid him the 400*l.* After verdict for the Plaintiff it was moved in Arreſt of Judgment, That here are two Conſiderations, and the Plaintiff had averred the Performance only of one. But (held) by the Court, Inſomuch as the Plaintiff hath undertaken, that he will not ſue the Obligation to the Coroner, it was a Promiſe not to ſue; and ſo he need not aver the Performance thereof, it being a Promiſe againſt a Promiſe, as is *Nicholas* againſt *Ramhead*, *Hob.* 88, 106. And gave Judgment for the Plaintiff.

Chantrell againſt *Randall.*

Leaſe for forty Years after Death, Surrender or other Determination of an Eſtate for Life. Vide poſt, 77. 2 Lev. 108, 242.

IN Ejectment, on Iſſue Not guilty, and a Special Verdict the Caſe was, a Copyhold was granted to *A. B.* and *C.* for their Lives, ſucceſſively as they are named; then the Lord grants and demiſes the Lands for forty Years after the Death, Surrender, Forfeiture, or other Determination of the Eſtate of *A. B.* and *C.* Then *A.* and *B.* die, and *C.* takes a Wife and dies, and the Wife keeps herſelf in (Poſſeſſion) for her Life, by the Cuſtom, as her Free Bench, and dies; And if the Leaſe for forty Years ſhould commence from the Death of the Huſband, or of the Wife, was the Queſtion: For if it ſhould commence from the Death of the Huſband it is expired, if of the Wife, it had ſtill a Continuance for twenty Years. It was agreed, That the Free Bench is to many Purpoſes a Continuance of the Huſband's Eſtate; but here the Words of the Leaſe for forty Years * are, *To have*, &c. *from the Death, Surrender, Forfeiture, or other Determination* of the Eſtate made to *A. B.* and *C.* and then the Law ſupplies the Words, *which ſhall firſt happen*; as was adjudged in this Court in *Hillary* Term 1652. *Rot.* 1617. Between *Stephens* and *Capel*, That the ſubſequent Leaſe ſhould commence from the firſt of the Contingents which ſhall happen: And by *Twyſden* and *Wyndham* it was held on the firſt Argument, That the Leaſe ſhall not commence till after the Wife's Death, and that the Words *Death, Forfeiture, Surrender*, were

Tenant for Life dies, and his Wife Tenant in Free Bench.

* P. 21

to

to be underſtood, *ſuch Death, Forfeiture,* &c. as ſhould determine the Eſtate; and this by Reaſon of the ſubſequent Words, *or other Determination* of the Eſtate; and the firſt Words are only an Enumeration of the particular Ways by which the Eſtate might be determined; but if the Eſtate does not determine by any of thoſe Ways, (as in the Caſe at Bar, it does not by Reaſon of the Wife's *Free Bench,* which is a Continuance of the Huſband's Eſtate) the Leaſe ſhall not commence till the Death of the Wife, by which the Huſband's Eſtate is determin'd; and it cannot be reaſonably intended, that the ſubſequent Eſtate ſhould commence before the Continuance (Determination) of the precedent, which by Poſſibility might continue longer than the forty Years, for the Wife might out-live the forty Years, and then the Leaſe for forty Years from the Huſband's Death, would be vain and idle. But it was adjourned.

Termino

* P. 22

*Termino Paſchæ,

ANNO

13 Car. II. in Banco Regis.

Robins againſt *Cox* and *Warwicke.*

An Aſſignee of Rent reſerved on a Leaſe for Years, ſhall have Debt for it.
S. C. Raym. 11. 1 Keb. 1, 42, 71, 153, 250. 2 Jo. 2. accord.

IN Debt, Plaintiff declares, That *A.* was ſeiſed of Lands, and leaſed it to the Defendant for Years, rendering 30*l.* yearly Rent, and after granted the Rent to the Plaintiff; to which Grant the Defendant attorned, and for 30*l.* being a Year's Rent, was the Action brought: And after Verdict for the Plaintiff it was moved in Arreſt of Judgment, That the Action lay not for default of Privity; for the Privity of Eſtate remained with the Leſſor, and no Privity of Contract paſſed to the Grantee; and of ſuch Opinion were *Foſter* and *Mallett*, on divers Arguments at the Bar. But *Twyſden* and *Wyndham* on the contrary, That the Attornment of the Tenant made a Privity, for his Attornment is a Conſent to the Grant, and that the Grantee ſhall have the Rent: And by *Wyndham*, The Privity of Eſtate remains with the Leſſor; but the Privity of Contract is transferred to the Grantee with the Rent; and divers Caſes were cited on both Sides, *pro & contra*, but not coming up directly to the Point in Queſtion, the Court was divided in Opinion, and the Caſe adjourned into the Exchequer-Chamber. But after this, the third Part of Sir *George Croke's* Reports were publiſhed and there *fol.* 637, 651. in *Ard* and *Watkins's* Caſe it was adjudged, That the Deviſee of a Rent reſerved on a Leaſe for Years, as here, might maintain Debt for the Rent. (Whereupon) the Parties

Poſt, 259.

Parties before any Argument in the Exchequer-Chamber agreed, and the Rent was paid without more (ado.)

* *Note*, The Caſes cited for the Plaintiff were *Bro. det.* 141. 2 *E.* 4. 11. *Long quinto E.* 4. 42. *Yelv.* 208. 1 *Bulſt.* 151. *Co.* 7. *Lilling ſton's* Caſe, *Dyer* 340. 5 *H.* 7. 18 *Co.* 4. 18. And on the Part of the Defendant were cited, 6 *Co. Bredeman's* Caſe, 4 *Co. Ognell's* Caſe, 1 *Leon.* 491. *Anſtin* and *Smith's* Caſe, where this Point came in Queſtion, but was not reſolved. * P. 23

Dr. *Widdrington's* Caſe.

THE Court was moved for a *Mandamus* to reſtore him to a Fellowſhip in *Chriſt's College* in *Cambridge*, which was oppoſed by *Jones*, becauſe the Univerſities have Conuſance of Pleas by their Charter, and the Colleges have their Viſitors; and therefore no *Mandamus* lies: But two Precedents were remembered to have been cited by *Arthur Trevor* in Dr. *Godland's* Caſe, of *Mandamus's* granted in the like Caſe, the one in the Time of *Edw.* 2. and the other in the Time of *Edw.* 3. To which *Jones* ſaid, That no *Mandamus* had been granted ſince thoſe till within theſe ten Years: But *Foſter*, Chief Juſtice, ſaid, That there was one about the End of Queen *Elizabeth's* Reign, or the Beginning of King *James's*; and thereupon the *Mandamus* was granted: But the Court ſaid, That if they returned Matters proper for themſelves to determine, this Court would ſend back the Matter to them; and in *Trinity* (Term) following a Return of the Writ was made; and ſome Exceptions taken thereto for miſnaming the Corporation; and Day was given to amend the Return, and to make it ſo as they would ſtand by it: And in *Michaelmas* (Term) following, the Return was argued at the Bar, And the Return was of the Foundation of the College, and of ſome of the Statutes of the Founder, whereby he appointed the Chancellor of the Univerſity to be their Viſitor; and thereupon it was only inſiſted, That there being a Special Viſitor appointed by the Founder, this Court had nothing to do in the Matter, but that all Appeals were to be to him and not to this Court, let the Foundation be either Spiritual or Temporal; which was much controverted, whether it was the one or the other.

Mandamus for a Fellow of a College, does not lie where there is a Viſitor. S. C. 1 Sid. 71. 1 Keb. 2. 50, 61, 68, 79, 131, 150, 234, 458. *Quære* 2 Jo. 174. Raym. 31, 68. Vide ante 19. Poſt, 65. 2 Lev. 14. Raym. 101. 1 Sid. 29, 40, 71 169, 346. 1 Mod. 84, 85.

And 'twas agreed, That if the Maſter of a College be outed by Wrong, an Aſſiſe will lie, as is ſaid in the End of *Canon*'s Caſe in *Dyer*; but not if he be outed by his proper Ordinary or Viſitor; and as the King may give Licence to found a College, * ſo he may give Power to make Laws for the Order and Government of ſuch College; and by thoſe they ſhall be governed, and by no others, and the Acts done by ſuch Governors ſhall be intended *rightly done*, and not examinable in this Court, 7 *Co.* 42. And although it was objected, That this Court hath the Superintendency of all Courts Spiritual and Temporal to keep them within their Juriſdictions, (which the Court agreed) yet ſeeing it did not appear, that they had executed their Juriſdiction, but only outed a Scholar, ſubject to their Juriſdiction; they are not for that (Matter) to appeal to this Court; for if ſo, the Matters of all Colleges and particular Juriſdictions would be drawn hither; but if they are grieved they ought to appeal to their Viſitor, which if they had done, there would be more Reaſon to hear them here; but to hear them now was to go by *Leaping*, which ought not to be, for all Proceedings ought to be by Degrees, (or Steps) as from one Ordinary to the next ſuperior Ordinary, and not at firſt daſh to leap to the Metropolitan, nor from the Common Pleas in *Ireland*, immediately to this Court; but firſt to the King's Bench in *Ireland*, and from thence to this Court; and the like: And afterward in *Hillary* Term next following, all the Judges delivered their Opinions, That the *Mandamus* did not lie on this Return: But inaſmuch as the Return contained many falſe Scandals of the Doctor, the Court adviſed the Doctor to bring an Action on the Caſe for thoſe as for a Libel; but they could not relieve him by a *Mandamus*.

* P. 24

Superintendency of *B. R.*

Vide Yelv. 117, 118. Fitzh. Error, 83, 89. 1 Roll. Abr. 755. pl. 15.

Bernard againſt *Evens*.

Contract to retain Tithes for the Life of the Parſon. S. C. Raym. 14. Keb. 5. 21. 3 Burr. 1873. 3 Bac. Abr. 338, 5 Bac. Abr. 93.

IN Debt for Tithes for four Years, the Defendant pleads an Agreement between the Plaintiff and him, That he ſhould retain the Land diſcharged of Tithes during the Life of the Plaintiff, if he ſo long continued Parſon: Iſſue (was) on the Agreement, and a Verdict for the Defendant; and Judgment for him after Motion in

in Arreſt of Judgment. For although *Firſt*, A *Leaſe of Tithes* cannot be without Deed. And *Secondly*, That it cannot be a good Leaſe for the Uncertainty, as *Co. Litt.* 45. *b.* and 2 *Cro. Hawkes* v. *Brogfield*, *Owen* 103. *Hob.* 176. Yet this being only a *Contract* for retaining the Tithes, it is good, according to 2 *Cro. Honicomb* againſt *Sweet*. And by the whole Court Judgment was for the Defendant.

* *Garrett* againſt *Liſter*.

* P. 25

EJECTMENT was brought, and in Evidence to the Jury at the Bar, the Caſe was, That a Man poſſeſſed of a long Term for Years, deviſed it to his Wife for Life; Remainder to Truſtees for his Son's Life; Remainder in Truſt for the Heirs of the Son's Body; Remainder to the Son's right Heirs, and makes the Wife Executrix; (and held) by the Court, (That) the Wife took the Term wholly as Executrix in the firſt Place, till ſhe agreed to the Deviſe; but it being proved, that ſhe ſaid, ſhe would take the Term according to the Will, it was held by the Court to be a ſufficient Aſſent. And a Caſe was cited, where in a like Caſe, the Wife's ſaying, That the Son was to have the Eſtate after her, it was reſolved to be a good Aſſent. But then the original Leaſe could not be produced; but it being an ancient Leaſe, the Grandſon of the Leſſor producing a Counterpart found among the other Evidences of his Grandfather, it was allowed for Evidence, though no Witneſs was ſubſcribed thereto: For Juſtice *Wyndham* ſaid, He had ſeen many Deeds of the Time of Queen *Elizabeth*'s Reign, without Witneſſes: Then a Title being made to the Term by one as Adminiſtrator, and no Letters of Adminiſtration produced, the Book of the Eccleſiaſtical Court where it was granted being produced, wherein was entered the Act or Order of the Court for the granting thereof, it was allowed to be good Evidence. And *Twyſden* ſaid, That it was ſo done in the Earl of *Manchester*'s Caſe.

Aſſent by an Executrix to the Deviſe of a Term.
S. C. 1 Keb. 15.
1 Sid. 37.
Vide poſt 290.
3 Lev. 22.
Vide Cro. El. 719.
1 Sid. 188.
5 Co. 29. b.
1 Roll. Ab. 619, 620.
1 Leon. 216.
1 Brownl. 132.
2 Brownl. 173.
March. 135.
Cro. El. 223, 347.
3 Leon. 36.
2 P. Wm. 532.

Counterpart of a Leaſe allowed as Evidence without Witneſſes.
Vide 1 Keb. 134.
Hard. 119.
6 Mod. 225, 248.
Fareſt. 129.

Act of Court, Evidence of an Adminiſtration.

Vane

Vane againſt *Minſhall.*

Rent arrear on a Leaſe to the Wife whilſt ſole, is recovered againſt the Huſband after her Death. S. C. 1 Keb. 20, 22. Raym. 6. 3 Lev. 403. Vide 4 Co. 51. 5 Co. 10, 36. * P. 26 Co. Litt. 112. b. 1 And. 47. 10 H. 6. 11. Vide 3 Lev. 403. 1 Danv. 713.

DEBT for Rent, on a Leaſe made to a Woman whilſt ſole, who (after) takes Huſband; the Rent is arrear, the Term expires, the Wife dies, and the Action is brought againſt the Huſband, to which he demurs: And it was argued by *Wylde*, That the Action does not lie againſt the Huſband, becauſe it being a Thing in Action, and not recovered in the Wife's Life, the Huſband is not chargeable any more than on her Obligation. But by *Allen*, and ſo adjudged; The Huſband here is charged in reſpect of the Perception of the Profits * by himſelf, and therefore ſhall be charged after the Wife's Death; and it is not like the Caſe put of an Obligation; which was agreed to be Law; wherefore Judgment was for the Plaintiff.

Note, In *F. N. B.* 121. *C.* is this very Caſe.

Whitwicke againſt *Oſbaſton.*

Pardon with Exceptions, where the Party is to ſhew he is none of thoſe excepted. S. C. 1 Keb. 20. Poſt, 120, 121. Ante 8.

DEBT on the Act of general Pardon for ſpeaking ſcandalous Words of him contrary to the ſaid Act, which prohibits ſuch ſpeaking under a Penalty, for which Penalty the Action is brought; and after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That divers Perſons are excepted in the Act, and the Plaintiff has not ſhewn that he is none of the Perſons excepted: To which it was anſwered, That the Body of the Act is general, and the Perſons are excepted by *Proviſo*; and then the Plaintiff need not ſhew that he is not any of the Perſons excepted; but if in the Body of the Act a Pardon was of all Perſons except ſuch and ſuch, there he ought: But in this Caſe of a *Proviſo*, If he be one of the Perſons excepted, the other Party ought to ſhew it; as in the Caſe of an Obligation, or a Feoffment on Condition, the Obligee or Feoffee need not ſhew the Condition, but it is enough for him to ſhew the Obligation or Feoffment, and the other Party for whoſe Benefit it is, is to ſhew the Condition, if he will take Advantage thereof.

Milſax

Milſax againſt *Baker.*

IN Ejectment, in Evidence to a Jury at the Bar, reſolved; *Firſt*, That if a Copyholder commit a Forfeiture the Lord may grant the Copyhold Eſtate to another before any Seizure; for it is a Determination of the Will, and the Eſtate is immediately in the Lord, as in his Reverſion. *Secondly*, That a Lord *pro tempore* of any legal Title, though it be at Will, by Admiſſion of a Copyholder after a Forfeiture committed, hath diſpenſed with the Forfeiture, not only as to himſelf, but alſo as to him in the Reverſion, for he may make voluntary Grants; 4 *Co.* 23. *b.* 24. and ſuch * new Grant and Admittance amount to an Entry for the Forfeiture and a new Grant. But a *Lord* by Tort or by Diſſeiſin, cannot by ſuch Admittance purge the Forfeiture as to the rightful *Lord.*

Forfeiture of a Copyhold, purged by an Admiſſion by a Lord *pro tempore*, when. S. C. 1 Keb. 25, 26. 2 Danv. 207. Vide 2 Danv. 192. c. & r. *ibid.* Poſt, 63. 2 Saund. 422. * P. 27 1 Mod. 199, 200. 2 Sid. 89. Winch. 67. Cro. Jac. 101. 1 Brownl. 132. Gilb. Ten. 230.

Cro. El. 409. Owen 63. Moor 393. 1 Roll. Abr. 509. G. 2 Com. Dig. 502.

Thinne againſt *Thinne.*

ASSUMPSIT on a feigned Iſſue directed out of Chancery, for trying whether certain Lands did paſs by a Common Recovery, and if the Entail of them were thereby barred. And on the Evidence, the Caſe was, A Man ſeized of the Manor of *Lavington*, and of divers other Lands there, which in Truth were not Parcel of the Manor, but purchaſed by the Lord of the Manor divers Years before, and after the Purchaſe reputed Parcel; and being ſo ſeized, with Intent to make a Tenant to the *Præcipe*, bargains and ſells the Manor, and all Lands Parcel or reputed Parcel, to *A.* againſt whom a *Præcipe* was brought, and a Common Recovery ſuffered by Name of the ſaid Manor, with Voucher of the Lord; and if this Recovery ſhould bar the Entail as to the Lands (that were) not Parcel, was the Queſtion. It was agreed, That they paſſed by the Bargain, by the Name of reputed Parcel. But it was inſiſted, That they did not paſs by the Recovery of the Manor: For tho' by Recovery of the Manor, a Manor in Reputation, tho' it be not in Truth a Manor, ſhall paſs, as

Indenture to ſuffer a Recovery of a Manor, and of all Lands reputed Parcel, the Recovery is ſuffered of the Manor. What Lands reputed Parcel ſhall paſs. S. C. 1 Vent. 51, 52. 1 Sid. 190. 1 Mod. 251. 2 Mod. 235. 1 Keb. 26, 591, 691, 716.

as Sir *Moyle Finch*'s Caſe, 6 *Co.* is, becauſe otherwiſe the Recovery ſhould be void: But here where there is a Manor in Fact to anſwer the Name of a Manor in the Recovery, other Lands, which are not Parcel, but in Reputation, ſhall not paſs; and tho' the Lands have been uſed with the Manor, now Fourſcore Years, and reputed Parcel, yet they ſhall not paſs by the Recovery of the Manor with its Appurtenances, as it is ſo; for the Word *Appurtenances* ſhall not paſs a Thing that is not Parcel; and there may be a difference between a Fine and a *Præcipe* for a common Recovery, where the Demand ought to be of certain Things by certain Names. And Juſtice *Twyſden* ſaid, That he had ſeen the Opinion of all the Juſtices at one Time, that the Fine in Sir *Moyle Finch*'s Caſe, did not paſs the reputed Manors: But that Sir *Edward Coke*, after he came to be Chief Juſtice, cauſed it to be adjudged as he reports it: And he ſaid, it was well he did ſo, for it would concern the Settlements of very many * Eſtates: And therefore this Caſe
* P. 28 here was found ſpecially. And afterwards in *Michaelmas* Term, 15 *Car.* 2. It was argued at the Bar by *Jones* of the one Side, and *Winnington* of the other; and the Judges were then of divers Opinions; And in *Eaſter* Term, 16 *Car.* 2. it was argued again by *Finch* of the one Part, and Serjeant *Glyn* of the other, and the Court took Time till the End of the Term to deliver their Opinion, and then all agreed, and *Hyde*, Chief Juſtice, delivered the Opinion for all of them, That the Lands reputed Parcel, paſſed by the Recovery as well as the other (Lands) and ſo they did in a Conveyance in the Caſe of the King; for he had made Grants of the Manor of *St. James*, which is not a Manor, but in Reputation. And common Recoveries are common Aſſurances, and the Indenture of Bargain and Sale, which made the Tenants to the *Præcipe*, and declared the Intent was to ſuffer a Recovery, not only of the Manor, but alſo of all Lands, Parcel, or reputed Parcel (thereof;) and theſe (Lands) have been reputed Parcel for 80 Years: And they made no difference between a Fine and a Recovery of a Manor, where it is nothing but a Manor in Reputation, nor where it is a Manor indeed, and other Lands, beſides the Manor, not Parcel, but ſo reputed both ſhall paſs by the Fine

or

or Recovery, the Indenture ſhewing the Intent to paſs the Manor and all Lands reputed Parcel.

Carpenter againſt *Marſhal.*

EJECTMENT was tried at the Bar, and found ſpecially; where the Caſe was, a Leaſe for Years, being made by the King of Dutchy-Lands lying out of the County-Palatine; afterwards King *James* I. in the ſeventh Year of his Reign, granted the Reverſion by the Dutchy-Seal of the County-Palatine; and the Great Seal to one, under whom the Plaintiff claims, but no Attornment was had. King *Cha.* I. reciting the ſaid Grant, and that it was void, granted the Reverſion under the Dutchy-Seal to the Defendant to whom the Leſſee attorn'd; and the Leaſe being determined, the Leſſor brought Ejectment againſt the Defendant, who had got the Poſſeſſion; whereupon the ſole Queſtion was, Whether the Land paſſed by the firſt Patent, being Dutchy-Lands, lying out of the County-Palatine, *without Attornment? And it was argued in *Hillary* Term 15 & 16. *Car.* 2. by *Jones* for the Plaintiff, and *Weſton* for the Defendant; and in *Eaſter* Term the 16th. by *Maynard* for the Plaintiff, and for the Defendant; and it was agreed on both Sides, That the Great Seal, and the County-Palatine Seal, ſignify nothing in the Caſe. For by the Stat. 37 *H.* 8. *c.* 16. Lands with in the County-Palatine, muſt paſs by the County-Palatine Seal; and Lands out of the County by the Dutchy-Seal: But the Objection was, That the Lands of the Dutchy being ſevered from the Crown by the Statute of 3 *H.* 5. *n.* 15. and 1 *H.* 7. *Seſſ.* 1. *n.* 2. That at the paſſing of thoſe Lands, Livery and Attornment are neceſſary, as in the Caſe of a Subject; for the King has thoſe Lands as Duke, and not as King. But afterwards in the ſame *Eaſter* Term, it was reſolved by all the Court, That the Lands paſſed by Grant of the Reverſion without Attornment; and the Grant under the Dutchy-Seal is a Grant by Record, and paſſes the Reverſion, as a Fine, *viz.* to diveſt the Eſtate without Attornment: But not to make a Privity to found an Action of Waſte, *&c.* according to the 4 *Inſt.* 209. But if the King will make a Feoffment thereof, Livery ought to be made, as in the Caſe of a Subject;

Grant of Dutchy Lands may be without Attornment, but to a Feoffment Livery muſt be. S. C. 1 Sid. 189. Ray. 90. 1 Keb. 37. N's Lutw. 392. Vide 2 Lev. 24.

* P. 29

ject; for this the King may do by Attorney: And Judgment was given for the Plaintiff.

Graves againſt *Sawcer.*

Caſe lies not by one Tenant in common againſt another for diſpoſing of the whole. S.C.Raym. 15. 1 Keb. 88. Noy. 14. con. 3 Leon. 223. &c. Pop. 96, 97. Cr. Jac. 91. Mo. 395. 3 Com. Dig. 266.

CASE, for that whereas he was poſſeſſed of the ſixteenth Part of a Ship in common with the Defendant, the Defendant to defraud him of his Part, had diſpoſed of the whole, and ſent him to *India* without his Aſſent. And after Verdict, Judgment was ſtayed, becauſe no ſuch Action lies by one Tenant in Common againſt another: Nor as *Lit. Sect.* 222. ſays, where one Tenant in Common diſpoſes of the whole, has the other any Remedy; therefore not by Action on the Caſe: Nor is the Suppoſal of Fraud material in the Caſe, for between Tenants in Common, there cannot be Fraud, as *Wyndham* ſaid; for by the Law, each has the Power to diſpoſe of the whole.

* P. 30

* *Smarte* againſt *Edſun.*

Judgment againſt two, one dies. Execution in the Perſonalty, if againſt the Survivor only. In the Realty, if againſt him and the Heir of the other. S. C. Raym. 25. 1 Keb. 92. 123.

JUDGMENT in Debt was had againſt two, one dies, the Plaintiff brought a *Scire Facias* againſt the Survivor only; the Defendant pleads, That the other hath left Lands and an Heir, to whom they were deſcended, and demands Judgment, whether he ſhould be compelled to anſwer without the Heir's being warned; whereupon the Plaintiff demurred, and Judgment was given, that he ſhould anſwer, for the Judgment is againſt the Perſon: And tho' that now by the Statute, which gives the *Scire Facias* and *Elegit*, he may charge the Lands to make it real: yet it is at his Election to purſue in the Perſonalty, if he will. 29 *Aſſ.* 27. 29 *E.* 3. 39. 1 *E.* 3. 41. But if he will take Execution on the Lien real, there the Charge ought to be equally againſt both, and a *Scire facias* againſt both. But it was ſaid, That if he brought a *Scire Facias* againſt both, and had Judgment thereupon, he might have a *Fieri Facias* againſt the Survivor only, or an *Elegit* againſt both.

Note, This Cauſe depended till *Michaelmas* Term, and then it was ruled to anſwer after divers Arguments.

Dorothy

Paſch. 13 *Car.* II. *in B. R.*

Dorothy Chute againſt .....

DEBT on a Leaſe for Years, where the Caſe was, That *Chute*, the Plaintiff's Huſband, covenanted in Conſideration of Marriage to ſtand ſeized to the uſe of himſelf for Life, Remainder to the Plaintiff for Life, Remainder to his own right Heirs, and a *Proviſo* was for making Leaſes, and that he made the Leaſe in Queſtion to the Defendant, rendering Rent, and died; and for this Rent, the Wife brought the Action, and had a Verdict. But on the Motion of *Jones* Judgment was ſtayed; Becauſe the Power being general to make Leaſes, and not particular to any particular Perſon, nor on any particular Conſideration, no Uſe could ariſe upon the Covenant to ſtand ſeized, as it might upon a Feoffment or Fine, as is reſolved in *Co. Mildmay's* Caſe; and therefore in this Caſe the Leaſe is void, and then no Rent is due.

Covenant to ſtand ſeized with a Power to make Leaſes generally. Q. If good. Vide Poſt, 55. 171. 2 Lev. 9. 76, 213, 223, 226. 3 Lev. 126, 306, 372. 1 Co. 176. Hob. 151. Mo. 93. 102, 195, 504. Cro. El. 394, 514. Cro. Jac. 168, 175. 2 Co. 15. 1 And. 141. Cart. 138, 140. 2 And. 44. Raym. 13. 2 Rem. 249. 1

Ow. 40. Sty. 196. Cro. Car. 400. Hob. 151, 159, 313. 1 Leon. 131. Rol. ab. 260, 783 to 789. 1 Vent. 372. 2 Vent. 318. Fearne Cont. Bac. Abr. 314. 5 Bac. Abr. 371.

* *Prideaux* againſt *Webber*.

* P. 31

TRESPASS for an Aſſault, Battery and Impriſonment, 1° *May* 1657. The Defendant pleads, That the Treſpaſs, Aſſault and Impriſonment aforeſaid, were done the 29th of *October* 1655. and pleads the Statute of Limitation: The Plaintiff replies, That certain Rebels (not naming any) had uſurped the Government, and none of the King's Courts were open; the Defendant rejoins, and confeſſes the Uſurpation, and further pleads the Act of Pardon of all Things, and Acts of Hoſtility done under the uſurped Authorities; and further pleads the Act for confirming all judicial Proceedings in the late Times; and further pleads a Warrant to impriſon him, *Et hoc parat. eſt verificare, &c.* whereupon the Plaintiff demurs. And now by *Bear* Serjeant, for the Plaintiff it was argued, That the Plea in Bar was ill in not anſwering to the Battery; but to this it was anſwered, and ſo reſolved by the Court in *Hillary* Term following, That (the Words) *Tranſgreſſio prædict'* is an Anſwer to the Whole. *Secondly*, It was argued by

Treſpaſs, Aſſault, &c. and no Anſwer to the Battery. Vide ante 16. & 1 Saund. 207, 209.

Statute of Li-

mitations bars Actions in Times of the Rebellion.

Bear, That the Statute of Limitations is not pleadable, becauſe there being a ſtop of Juſtice, and no legal Court, held, none was bound to proſecute, eſpecially for ſuch an Impriſonment as here in thoſe Times. *Thirdly*, It was objected by him, That the Rejoinder is multifarious and impertinent, in pleading two Statutes. And *Fourthly*, In not concluding on the Statutes *prout patet per Recordum*. But afterwards in *Hillary* Term it was adjudged for the Defendant, and that the Statute of Limitations was a Bar, and the Bar being good, and the Replication inſufficient, it is not material what the Rejoinder is; and Judgment was given for the Defendant by the whole Court. And the Reaſon they gave that the Statute of Limitations was a good Bar, (be it ſo, as it was pleaded, that the Courts were not open) was, Becauſe there is not any Exception in the Act of ſuch a Caſe; and Infants had been bound (thereby) if they had not been excepted.

Bar good, and Rejoinder ill, yet Judgment for the Defendant.

* P. 32.

* *Serjeant* againſt *Fairfax*.

Iſſue improper or immaterial, where a Repleader ſhall be or not.
S. C. 1 Keb. 33, 39, 89, 90.
Vide 6 Mod. 2, 3, &c.
Vide 2 Lev. 12, 142, 164.
1 Salk. 216.
2 Salk. 579.
3 Lev. 20, 440.
6 Mod. 2, 102.
40 E. 3. 15.
5 E. 4. 8.
19 E. 4. 1.
22 H. 6. 16.
Dyer 117, 118.
Stra. 847.
5 Com. Dig. 155, 156.

DEBT againſt Leſſee for Years for the Rent, the Defendant pleads, That he before the Rent was due for which the Action is brought, had aſſigned the Term to another, of which the Plaintiff had Notice; the Plaintiff took Iſſue on the Notice, and a Verdict being for the Defendant; it was moved by *Allen* for the Plaintiff, That no Judgment ought to be given, but a Repleader (awarded) becauſe the Iſſue was taken of a Thing immaterial; for it is not the notice of the Aſſignment of the Term, without Agreement of the Leſſor, or Acceptance of the Rent by him from the Aſſignee that diſcharges the Leſſor, but his Agreement thereto, or Acceptance of the Rent from the Aſſignee does it; and he cited *Nichols*'s Caſe in 5 *Co.* where Iſſue taken of Payment on a ſingle Bill being found for the Plaintiff, he ſhall have Judgment; but if it had been found that he had paid, Judgment ſhould be arreſted; and the Difference, he ſaid, is when the Iſſue is found againſt the Pleader, Judgment ſhall be for the Plaintiff, but if for him, not. (But) Juſtice *Twyſden* ſaid, That if an improper

proper Iſſue is taken, and Verdict given (thereon) Judgment ſhall be given thereupon, be it for the Plaintiff or Defendant; and cited 2 *Cro.* 575. But an immaterial Iſſue is, whereupon the Verdict the Court cannot know for whom to give Judgment, whether for the Plaintiff or for the Defendant, as in *Hob.* 175. And with him the Chief Juſtice and *Wyndham* wholly agreed, and awarded a Repleader. See 2 *Cro.* 585. 3 *Cro.* 227, 228, & 2 *Cro.* 5.

* *Andrews* againſt *Herne.*

* P. 33

Aſſumpſit to pay, &c. If *Charles Stuart* were King of *England* within twelve Months, he being then in Exile. S. C. 1 Keb. 56, 65. 1 Danv. 41. pl. 12.

ASSUMPSIT in Conſideration of 20*s.* paid to the Defendant by the Plaintiff, to pay the Plaintiff 20*l.* if *Charles Stuart ſhould be King of* England *within twelve Months then next following*; (this being when the King was in Exile, and about ſix Months before his Reſtoration) After Verdict for the Plaintiff 'twas moved in Arreſt of Judgment, That here is no Conſideration, for he was then King of *England* at the Time of the Promiſe; but if it had been, *If he ſhould be King of* England *ſix Months hence*, it might have been good, becauſe of the Accident that he might die within ſix Months: But held by the Court, That the Conſideration is good, for the Words are to be taken according to the ſubject Matter; the King was at the Time of the Promiſe out of Poſſeſſion, and the Promiſe is to be intended, If he ſhould be in Poſſeſſion within the twelve Months.

Windſor againſt *Saywell.*

One outlawed in a perſonal Action, aliens before Seizure.

IN Ejectment and Special Verdict, the Caſe was; *Gorge* ſeiſed of Lands in Fee, confeſſed a Judgment to the Leſſor of the Plaintiff, he being then outlawed in a perſonal Action; but before any Seizure of the Lands, levied a Fine to a Stranger; and afterwards the Leſſor ſued Execution of the Lands by *Elegit*: And it was argued by *Glyn* and *Wylde*, the King's Serjeants, That no Execution may be had after the Outlawry; and they cited the Caſe of one *Pickering*, to be ſo reſolved in the Exchequer. *Jones* and *Allen* on the other Side argued,

What Intereſt the King hath hath in the Lands of one outlawed in perſonal Actions.

That nothing accrues to the King by an Outlawry in perſonal Actions, but only Perception of the Profits, *Hob.* 20. *Plowd. Com.* 541. and that he could not in ſuch Caſe plough or ſow the Land; and *Allen* ſaid, He was of Counſel in *Pickering*'s Caſe, and the Caſe was, That after Inquiſition, but before Return thereof, the Perſon outlawed made a Bargain and Sale of Lands, and it was adjudged for the King, but principally for Default in the Pleadings; for he ſaid there were only two Judges in Court, and thoſe divided in Opinion as to the principal Matter. And afterwards at another
* P 34 Day, * the Chief Juſtice and *Twyſden* ſaying, they had ſpoken with *Hale* Chief Baron, and the other Barons of the Exchequer, who told them, That the Courſe of the Exchequer is, That by a Feoffment before Seizure, the King is outed of the pernancy of the Profits; but not by a Feoffment after Seizure. And thereupon they gave Judgment for the Plaintiff.

Term.

* Term. Sanct. Trin.

ANNO

13 Car. II. in Banco Regis.

Goodwin againſt *Clark*.

EJECTMENT and Special Verdict. A Settlement was in Conſideration of Marriage, and 1000*l.* (paid) for the Uſe of the Huſband for Life, Remainder to his Son in the uſual manner, and if he (the Huſband) ſhould die without Iſſue Male, to the Uſe of the Daughters for a Term for raiſing 1500*l.* for their Portions. The Huſband left a Son and a Daughter, and afterwards the Son died without Iſſue, whereby the Lands remained over to another, according to the Settlement, and the Daughter brought Ejectment. This Caſe had been adjudged two ſeveral Times before in ſeveral Courts, the one time for the Plaintiff, the other for the Defendant; and the ſole Queſtion was, If the Huſband leaving a Son, who after dies without Iſſue, whether the Huſband ſhall be now ſaid to die without Iſſue Male be within the Intent of the Settlement, ſo that the Term ſhould ariſe to the Daughter? For it was ſaid for the Defendant, That he did not die without Iſſue Male, for that he left a Son, tho' this Son afterward died without Iſſue; and the Intent of the Settlement was well ſatisfied by the leaving of a Daughter in Satisfaction of the Portion: But it cannot be intended, That when, or at what Time whenſoever, the Iſſue Male fails, the Daughters ſhould have Portions, for that may happen 100 Years after, when the Sons are dead, and ſo no Benefit or

A Settlement to the Huſband for Life, Remainder to the Son in Tail: And if he dies without Iſſue Male, Remainder to his Daughters for 500 Years, he dies leaving a Son, who dies without Iſſue. S. C. 1 Sid. 102. 1 Keb. 73, 78, 169, 247, 462. Vide the D. of *Norfolk*'s Caſe in Chancery Caſes, 3 Part.

or Advantage to the Daughters. It was alſo ſaid to be ill in the Creation, if it ſhould be ſo intended to ariſe at ſuch a Diſtance of Time, *viz.* whenſoever there ſhould be a Failer of Iſſue Male. But to this it was
* P. 36 anſwered, *. That whenſoever the Iſſue Male fail, the Huſband is ſaid to be dead without Iſſue. 8 *Co. Bulmer's* Caſe, and 38 *E.* 3. 26 *Dyer* 4. & 349. were cited to this Purpoſe. And as to the Benefit or Advancement of the Daughters, it was ſaid, That this Expectation is an Advantage for them to be advanced in Marriage: And as to the creating of the Term, it was ſaid, That a Term may as well be created to ariſe upon the Failure of Iſſue Male, as a Power to ſell on the Failure of Iſſue Male, which hath been adjudged good in the Caſe of *Vincent* and *Lee* in *Moor. Rep.* 147. 3 *Cro.* 26. 1 *Leon.* 285. 3 *Leon.* 106. *Co. Lit.* 113. *a.* And as to the Objection of a Perpetuity, it is nothing, for the Son, who had the Eſtate precedent, might bar it by a Common Recovery. And of this Opinion were all the Court, except *Mallet.* And after divers Arguments at the Bar by Serjeant *Nudigate* for the Plaintiff, and *Wylde* the King's Serjeant for the Defendant in this Term, and in *Michaelmas* Term following, by *Aleyn* for the Plaintiff, and *Kittlewel* for the Defendant, and in *Eaſter* Term, 14 *Car.* 2. by *Finch* the King's Solicitor for the Plaintiff, and *Jones* for the Defendant; Judgment was given in *Eaſter* Term, 14 *Car.* 2. for the Plaintiff.

Stephens againſt *Britridge.*

Huſband Tenant for Life, Remainder to the Wife for Life; Remainder to the Heirs of their Bodies; they levy a Fine with Warranty, it doth not diſcontinue nor deveſt the Eſtates, nor is the Warranty any bar.

IN Ejectment on not Guilty, and a Special Verdict, the Caſe was, Sir *Francis Wortley*, ſeiſed in Fee, covenanted on his intended Marriage with the Woman which he afterwards married, to ſtand ſeiſed to the Uſe of himſelf and his Heirs till the Marriage, and after the Marriage, to the Uſe of himſelf for Life, Remainder to the Heirs Males of their Bodies begotten, Remainder to the Leſſor of the Plaintiff, being a Daughter by a former Venter, the Remainder to his own right Heirs. The Marriage took Effect, and they had iſſue only one Daughter, Wife of the Defendant; and afterwards he and his Wife levied a Fine with Warranty to the Defendant's

fendant's Wife; and both Sir *Francis* and his Wife were dead without other Iſſue: Whereupon the Leſſor brings Ejectment; and the Queſtion is, Whether this Warranty being deſcended on the Plaintiff ſhall bar him? And in order thereto, two Queſtions were made; *Firſt*, If the Fine made any Diſcontinuance? 2*dly*. If it was no Diſcontinuance, yet whether it * made no diveſting of the Eſtate in Remainder to the Leſſor? For if ſo, it was ſaid for the Defendant, that it made Room for the Warranty to operate thereupon, and to become a Bar. And for making it a Diſcontinuance it was much inſiſted, That the Eſtate-Tail was executed in the Huſband and Wife; and the Caſe of *King* and *Edwards*, in 1 *Cro.* was ſtrongly relied on; and it was ſaid, That the interpoſing Eſtate of the Wife could not prevent the Execution of the Eſtate-Tail, for the Remainder in Tail being next to the Eſtate for Life to the Wife, merged it; and it being ſo merged, nothing then interpoſed between the Eſtate for Life to the Huſband; and therefore that ought to be merged alſo by the Remainder in Tail, and ſo the Eſtate-Tail was executed: And this was the Subſtance of the Arguments for the Defendant, for whom it was argued this Term by *Winnington*, and the following Term by *Maynard*. But on the other Side it was argued this Term by *Allen*, and the next Term by *Jones*, and reſolved by the Chief Juſtice, *Twyſden*, and *Wyndham*, That the Fine did not make any Diſcontinuance, nor the Warranty any Bar. *Firſt*, Becauſe the Eſtate was not executed, being by the ſame Deed. 2 *Co. Wiſcot's* Caſe, but it is a mean (intervening) Remainder between the Huſband's Eſtate for Life, and the Eſtate-Tail, *viz.* the Eſtate to the Wife; and it cannot be intended, that when a Remainder for Life is limited to the Wife, That it ſhould inſtantly merge by the Remainder in Tail, to the Heirs of the Huſband and Wife; and the Caſe of *King* and *Edwards* cited on the other Side, does not come up to this Caſe; for (there) the Huſband and Wife were jointly ſeized to them and the Heirs of the Body of the Huſband, and ſo the Eſtate-Tail was executed in Law; (but) here the Wife had an Eſtate in Remainder for Life; and then it is no more in Effect than *Bredon's* Caſe, That where a particular Tenant and him in Remainder levy a Fine, it is no Diſcontinuance, but

S. C. Raym. 36, 37. 1 Sid. 83. 1 Keb. 321. 2 Danv. 577. Vide 1 Roll. Abr. 632, 633, 634.

* P. 37

2 Roll. Rep. 311, 346, 467, 477, 484. Cro. El. 602. Sav. 77. 1 Leon. 299. 4 Leon. 191, 118, 119. Cro. Jac. 696, 698. Latch. 64, 72. Godb. 351. 1 Jo. 56, 57, 208, &c. 323, 358. Hutt. 126. 1 And. 286. 1 Bulſt. 162. Cro. Car. 156, 387, 405. Co. Litt. 332, 339. b. 10 Co. 96, &c. Vide poſt, 49. 2 Lev. 155. 3 Com. Dig. 239, 433.

but each grants that which he lawfully may; and the Eſtates being here in the ſame Perſons, it is all one as if they were in divers; and if the Eſtate-Tail be not a Diſcontinuance, the Warranty cannot be a Bar, 10 *Co. Seymor's* Caſe: And the Chief Juſtice and *Wyndham* held, That there is not any diſplacing or diveſting of the Remainder to the Leſſor, but that the Fine operates only as a Grant of him that has for Life, and of the Remainder in Tail, which they might lawfully grant, and not diſturb any Eſtate in Remainder; and if it made any
* P. 38 diſplacing of the Eſtate, * yet *Twyſden* ſaid, That it was only at the Election of him in Remainder, as where he ſhall bring a *Formedon*, and admit himſelf out of Poſſeſſion, there perhaps the Warranty might have been pleaded in Bar; but here he has entered and does not admit the Eſtate to be out of him, and, and thereupon he brings his Ejectment; and (he) cited 7 *H.* 5. 2. And they ſeemed to rely in ſome ſort on the Caſe in *Littleton*, Sect. 0. where a Wife being Tenant for Life, a Confirmation to the Huſband and Wife ſhall not enure to the Huſband, but as in Remainder, and *Peck* and *Channel's* Caſe in 3 *Cro.* where a Woman Tenant for Life, married the Remainder-man in Tail, and then they levy a Fine, this ſhall not diſcontinue the Tail; and in *Trin. Term.* 14 *Car.* 2. Judgment was given for the Plaintiff by the Chief Juſtice, *Twyſden* and *Wyndham*; but *Mallet* being very aged, was of a contrary Opinion, but gave no good Reaſon for it. And *Note*, *Twyſden* in this Caſe ſaid, That the Uſe to the Wife in this Caſe was good, being by way of Remainder, *viz.* To himſelf for Life, the Remainder to his intended Wife; but if the Limitation had been to himſelf, and ſuch a Woman as he ſhould marry by way of preſent Limitation, it had not been good: But *Quære*, of this Opinion, for it ſeems contrary by the Caſe in *Dyer*, 274. *b.* and it ſeems the Caſe cited in *Littleton* does not come up to this Caſe, for the Huſband cannot by any Acceptance (of another Eſtate, *&c.*) deſtroy the Freehold of the Wife.

Aleworth

Aleworth againſt *Roberts.*

THE Demandant in Dower *unde nihil habet* had Judgment, and the Writ of Seiſin was executed; the Tenant brought Error, and the Judgment was affirmed, but pending (the Writ of Error) the Tenant aliens the Land and dies, and now the Demandant brings a *Sci. Fa.* againſt the Heir of the Heir, and againſt the Alienee; ſuggeſting that her Huſband died ſeized; to which the Tenants ſeverally plead this Matter, whereupon the Demandant demurs: And it was argued this Term and *Michaelmas* Term following at the Bar, by *Strode* and *Seis* Serjeants for the Demandant; and by *Powys* and *Allen* for the Tenant, and afterwards in *Eaſter* Term 16 *Car.* 2. Judgment was given for the Tenant. The Court agreed, That the Judgment is a compleat Judgment at Common Law without the Damages, which are given by the Statute of *Marlbridge*, and that it is enough for the Wife to ſuggeſt the dying ſeized of the Huſband after the Judgment in Dower, for recovering the Damages; but the Statute of *Marlbridge*, which gives the *Damages, gives them againſt *Deforciatores* (*i. e.* Expellers by Force) and that neither the Alienee, nor the Heir of the Heir are in that Caſe; the Heir (it is true) ſhall be charged with Damages if he be in Life, but not his Heir or Alienee; but they are loſt by the Death of the Heir, and are not a Lien upon the Land which paſſes therewith: And if they ſhould be recovered, from what Time ſhall they be recovered? Not from the Death of the Huſband, becauſe neither of them had the Land at that Time; not from the Time of the Death of the Heir againſt whom the Judgment was; for neither of them was the Deforceor, but the Heir who is dead, and againſt whom the Judgment was, is the Deforceor; and they ſaid, This was not like the Caſe of Tithes on the Statute of *Edw.* 6. which they agreed are not loſt by the Death of the Tenants who ought to pay them; for there the Duty is certain, *viz.* the Value to be trebled in an Action of Debt; but here the Damages are wholly uncertain, and in Nature of Damages to be recovered in Treſpaſs.

Anonymus.

A Judgment in Dower is compleat without Damages, and Error lies thereon.
S. C. 1 Sid. 188.
1 Keb. 85, 171, &c.
2 Danv. 681.
Vide Yelv. 112.
3 Cro. 557.
Litt. R. 302.
1 Roll. Abr. 750. pl. 9.

* P. 39

On Judgment in Dower againſt the Heir, who aliens, no *Sci. Fa.* for Damages againſt his Heir or Alienee.
Vide 2 Danv. 681.
1 Rol. Abr. 796. pl. 30.
Debt for Tithes againſt Executors.

Anonymus.

Special Bail in an Action for Words.

IN an Action on the Case for calling a Person of Quality *Whore*, whereby she lost her Marriage: It was ruled on Motion, That the Defendant should find Special Bail, although generally in Actions for Words no Special Bail is usual; yet on the Circumstances of the Case, the Court may compel the Defendant to find Special Bail. And so in Cases of Executors, though they do not find Bail in ordinary Cases, yet in Special Cases they shall find Bail; as where it appears that they have wasted the Goods, *&c.*

Vide post, 86. Raym. 74. Vide Instit. Leg. 22. Special Bail by Executors.

See 1 Mod. 2. & 6 Mod. 230. Special Bail denied, though in gross Batteries.

* P. 40

* *Blucke* against *Mole.*

Copyholder surrenders the Reversion without Attornment or Notice. S.C. Raym. 18. 1 Keb. 93. Vide Nelson's Lutw. 112. 2 Lev. 231. Cro. El. 151. 2 Co. 68. 1 Co. 92. Hob. 178. 1 Mod. 87.

IN Replevin, a Copyholder in Fee leases, rendering Rent, and then surrenders the Reversion of two Parts to the Defendant; and for Rent arrear he distrained and avows, and shews the Lease and the Surrender, but does not shew any Attornment nor Notice of the Surrender; for which the Plaintiff demurs: And the Court on Argument were of Opinion, That the Distress in this Case was sufficient Notice. *Hob.* 207, 208. And it is not like to the Case where a Forfeiture is to be taken for the Breach of a Condition. 5 *Co.* 113. *b.* Also here, the Estate passes by the Surrender and Admittance in Court, which are public Acts, of which every Tenant may take Notice, and no Attornment necessary, because no Means to compel it, *Co. Litt.* 321. And Judgment was given for the Avowant, Except, *&c.*

Surrender of two Parts, the Surrendree avows.

Cooke against *Founds.*

Covenant that he is seized in [illegible]e, according [illegible]e Inden-

COVENANT brought, and declares, That the Defendant bargained and sold to him certain Lands (which he had purchased of *Woolaston* and other Trustees,

tees, in the late Times for the Sale of Delinquents Eſtates) and covenanted, That he was ſeized of a good Eſtate in Fee according to the Indenture made to him by *Woolaſton*, *&c.* and aſſigns for Breach, That he was not ſeized of a good Eſtate in Fee; the Defendant pleads, That he was ſeized of as good an Eſtate as *Woolaſton*, *&c.* conveyed to him; whereupon the Plaintiff demurs, and Judgment was given for him, for the Covenant is abſolute; that he is ſeized of a good Eſtate in Fee, and Reference to the Conveyance by *Woolaſton*, ſerves only to denote the Limitation and the Quality of the Eſtate, and not the defeaſibleneſs or indefeaſibleneſs of the Title.

ture whereby he purchaſed, the Covenant is abſolute.
S. C. 1 Keb. 91.
Vide 2 Mod. 311.
2 Danv. 243.
4 Com. Dig. 387.
2 Hawk. P. C. 557.
1 Term. Rep. 705.

Baſſet againſt *Morgan*.

* P. 41

DEBT on an Obligation, conditioned for paying to the Plaintiff at his Marriage, or Age of twenty-one Years, which ſhould firſt happen: The Defendant pleads, That the Plaintiff has not yet attained the Age of twenty one, and that he was never lawfully married; The Plaintiff takes Iſſue, that he was lawfully married, and this is found by the Jury for the Plaintiff. And it was moved in Arreſt of Judgment, That the Iſſue being on the Legality of the Marriage, ought to have been tried by the Ordinary, and not by Jury; though a Marriage or no Marriage is triable by Jury, 2 *Gro.* 102. But the Court held, That the material Part of this Iſſue was, married or not married; for the Condition of the Obligation is, to pay at his Marriage, and though the Defendant has put *lawfully* in his Plea, whereby the Plaintiff might have demurred, and has not, but has taken Iſſue thereupon; yet this being in a perſonal Action, where the Right of Marriage does not come naturally in Queſtion, as in Dower or other real Actions (it does) the Trial is well enough. Another Exception was taken, That the Replication does not ſay that he was married *Tempore brevis*, and ſo it may be after the Action commenced; but this was not allowed, for after Verdict it ſhall be intended to refer to the Time of the Writ.

Marriage or no Marriage triable by Jury, ſo is the Legality of Marriage in perſonal Actions.
Vide 1 Keb. 41, *&c.*
1 Sid. 13, 64, 387.
1 Show. 50.
2 Salk. 437.
Cowp. 127.
5 Com. Dig. 54.

Hargrave's Law Tracts 452.
Vide 1 Salk. 1, 6.
3 Bulſt. 61.
11 H. 6. 11.
6 Mod. 105.

Tempore brevis intended after Verdict.

Day

Day againſt *Guilford.*

Judgment againſt the Father Tenant for Life or in Tail, *Sci. Fa.* againſt the Heir, and he returned warned, ſuffers Judgment by Default. S. C. Raym. 19. 1 Keb. 112, 141. 1 Sid. 54. 2 Sid. 12. Vide 1 Cro. 296, 312. 2 Sid. 7 & 12.

IN Ejectment, on Not guilty, a Special Verdict. The Father Tenant for Life, Remainder to his Son in Fee, the Father acknowledges a Statute and dies; and a *Sci. Fa.* was awarded againſt the Son, who was returned *warned*; but made Default, and Judgment was againſt him by Default, and the Lands delivered on an *Elegit* to the Plaintiff's Leſſor. And it was argued for the Plaintiff by Serjeant *Wylde*, That by this Judgment by Default he being warned, and a *Sci. Fa.* returned, the Land of the Son is bound without Remedy; and cited *Barcock* and *Thomſon*'s Caſe to be ſo adjudged in 1652, which ſee in *Style*'s *Reports*, to which the Court inclined, and *Twyſden* Juſtice cited the Caſe of one *Gilbert* and *Ragg*, where a *Scire Facias* was ſued upon * a ſuppoſed Judgment, where there was none, and on *Scire Facias* returned, and Judgment by Default, the Party was left without Remedy; but *Wyndham* doubted: For here the Eſtate of the Son was never liable, and therefore he might have an Affiſe if he be outed; (but) *by the other three*, (though) the Eſtate of the Heir in Tail is not liable to the Judgment againſt his Father; yet if a Judgment in a *Scire Facias* after a *Scire Feci* returned, be had againſt him by Default, he ſhall be bound without Remedy: And afterwards Judgment was given for the Plaintiff, *except*, &c.

* P. 42

1 Sid. 55.

Term.

Term. Sanct. Mich.

ANNO

13 Car. II. in Banco Regis.

Palmer againſt *Stanage*. *Rot.* 1310.

IN Replevin, the Defendant made Conuſance for a Rent-Charge due at *Michaelmas* 1658, as Bailiff of *J. S.* The Plaintiff pleads in Bar, That the Defendant had at another Time made Conuſance as Bailiff to *J. S.* in a former Replevin brought by *J. D.* then Tenant of the Land; for the Rent due to *J. S.* at *Michaelmas* 1659, on which the Conuſant demurs; and it was argued for the Plaintiff, That the Conuſance made for a Rent due at a latter Day, was a Diſcharge of the Rent due at a former Day; and that there is no Book againſt this, except *Fitzherbert*'s Abridgment, *Barr.* 79. where he alſo ſays, That an Acquittance for Rent due at a latter Day, is no Diſcharge of Rent due at a former Day, which is contrary to all the other Books; and therefore he is not to be much regarded in the other Point; and tho' the former Conuſance was made upon another Perſon, it is not material, ſeeing it was made by the ſame Perſon, and in the ſame Right. But the whole Court, except *Mallett*, (who held, That if an Acquittance be an Eſtoppel, a Conuſance on Record is much more ſo) held the contrary; and that *Fitzherbert*, *Barr.* 79. is good Law in this Point of Avowry, and it would be the ſame Thing if the former Conuſance had been made on

Awowry for Rent due at a later Day no Bar of a Rent due at a former Day. S. C. 1 Keb. 95, 113. Raym. 21. 1 Sid. 44.

But Acquittance for Rent due at a later Day, is a Bar.

on the ſame Perſon, and they differenced in this Caſe from the Caſe of an Acquittance, which is a voluntary Act of the Party, and therefore is an Eſtoppel by Force of his Hand and Seal; but this is a compulſory Act, whereto he is compelled by the bringing of the Replevin :-And * *Foſter*, Chief Juſtice, ſaid, That the Avowry for Rent due at a latter Day, cannot be a Diſcharge of Rent due at a former Day, any more than a Recovery in an Action of Debt for Rent due at a latter Day, can be a Bar in an Action of Debt brought for Rent due at a former Day; and they ſaid the Caſe would have been all one if *J. S.* himſelf had avowed at both the Times: And gave Judgment for the Conuſant. *Excepi* (Cauſe ſhewn) on the *Monday* following.

* P. 44

Debt for Rent due at a former Day, and a Recovery.

Webb againſt *Bethel*.

Covenant to convey according to the Draughts agreed, needs no Tender of Wax, &c. for he hath taken it upon himſelf.
S. C. 1 Keb. 122.
Vide Latch. 126.
3 Lev. 319.
2 Danv. 37. Pl. 19, 20.
13 Leon. 1.

ASSUMPSIT, in Conſideration the Plaintiff had promiſed to pay the Defendant 700*l.* for the Reverſion of a Manor, the Defendant promiſed to ſeal two Inſtruments for the Aſſurance thereof, with Warranty, &c. according to two Draughts agreed on before between them; and altho' the Plaintiff had tendered him on the firſt of *March* two Inſtruments in Writing, according to the Draughts aforeſaid; and on the third of *March* requeſted him to ſeal them, yet he had not ſealed them, nor conveyed the Reverſion of the Manor. After Verdict for the Plaintiff, on *Non Aſſumpſit* (pleaded) it was moved in Arreſt of Judgment by Serjeant *Beare*; 1*ſt*, That he ought to ſhew the Inſtruments to the Court, that they may judge of them. 2*dly*. He does not ſhew that he tendered him Wax, Pen, Ink, &c. as he ought. 3*dly*. That the Requeſt was not well made, it being at another Time, and not when the Tender was: But Judgment was given by the whole Court for the Plaintiff. For as to the firſt, The Inſtruments were agreed before, and therefore he need not ſhew them to the Court. As to the ſecond, There needs not any Tender, for the Defendant has taken upon himſelf to do it. And as to the third, The Requeſt after the Tender is the better (way), for ſo he had Time to read and conſider them. And Juſtice *Wyndham* ſaid, Where Conveyances are before agreed, and to be ſealed according to that

that Agreement, ſo that there is no need of Counſel, the Defendant is to do it at his peril. And where one is to grant a Reverſion, he has Time to do it any Time during his Life, if it ſo long continues a Reverſion, if he be not haſtened by Requeſt; here was a Requeſt, and the Conveyances being (before) agreed, there needs no Tender. But if one be to ſeal a Conveyance generally, there the Counſel of the Purchaſer is intended to draw them, and then the Purchaſer ought to render them. *Quære*, For it was not denied by any.

When Tender of a Conveyance is requiſite or not.

**Caponhurſt* againſt *Caponhurſt*.

*P. 45

DEBT on an Obligation conditioned for Performance of Covenants in an Indenture, whereby the Defendant's Teſtator being Leſſee for Years of a long Term, aſſigned ſo much of the Term as ſhould be to come at the Time of his Death to the Plaintiff, and covenants that he ſhould enjoy it, and makes the Defendant his Executor, and dies; and aſſigns a Breach, That the Defendant, after the Teſtator's Death, outed him; and after Verdict for the Plaintiff, it was moved in Arreſt of Judgment by *Bigland*, That the Aſſignment of ſo much of his Term as ſhould be to come after his Death, was void; and then the Covenant is ſo alſo, for the Covenant cannot ſubſiſt without an Eſtate; and that the Aſſignment was void; he cited, 1 *Co.* The Rector of *Cheddington*'s Caſe, and *Gravenor*'s Caſe in *Dyer*, and 2 *Cro. Child* and *Bayley*'s Caſe. And that the Covenant is ſo alſo, he cited *Yelv.* 18. *Sophrani* againſt *Scarro*, and ſo held the Court as to thoſe Matters. But then it was moved by *Jones*, That the Obligation is then ſingle; for if the Condition refers to a Thing which is not, it is all one as there were no Condition, and to this the Court inclined: But afterwards, as I heard, for I was not preſent, they held, That the Covenant and the Obligation being both for the corroborating of a Grant, which was void, they were alſo both void; And gave Judgment for the Defendant.

Grant of ſo much of his Term as ſhould be, to come at his Death. S.C. Raym. 27. 1 Keb. 164, 130, 183.

Obligation to perform Covenants, where no Covenants are, is ſingle. V. ante 3. Poſt. 77. 3 Lev. 21, 75. 1 Jo. 171, 179. 2 Show. 15, 16.

Obligation to perform Covenants in a void Grant, all is void.

Hennings

Hennings againſt *Brabaſon.*

Leaſe for 80 Years, if *A.* ſhould ſo long live: and from the Death of *A.* for 31 Years more, all is but one Term. 8. C. 1 Keb. 154. Vide 2 Danv. 157. Pl. 2.

* P. 46

1 Sid. 8. Cart. 160.

Leaſe to begin at *Michaelmas.* Leſſee enters before *M.* and continues the Poſſeſſion till afterwards, it is a Diſſeiſin. Vide 2 Danv. 757. Pl. 12. Cro. Jac. 135, 159, 258, 429, 662. Lat. 199. 1 Sid. 8. Cart. 160. 3 Mod. 198, 199.

IN Ejectment on a Special Verdict, the Caſe was, The Earl of *Meath* 23 *Sept.* 13 *Car.* 1. leaſed the Tenements in Queſtion to *Underwood:* To hold to him for 81 Years from *Michaelmas* next following, if *A.* ſhould ſo long live; and from and after the Day of the Death of *A.* for 31 Years, the Leſſee enters the ſaid 23d of *September* before the Commencement of the Term, and continued in Poſſeſſion till the Year 1643, and then the Leſſor re-entered, the Leſſee being out of Poſſeſſion aſſigns the Term to the Leſſor of the * Plaintiff, who being kept out of Poſſeſſion, brought an Ejectment and recovered, and the Judgment (thereon) was delivered by *Bridgman*, Chief Juſtice; and firſt, he ſaid, That the Term not being to commence till *Michaelmas*, it was till then a future Intereſt, and the Entry by the Leſſee before was a Diſſeiſin; and his whole Continuance in Poſſeſſion till 1643, was a Seiſin by Diſſeiſin, and not a Poſſeſſion by Virtue of the Leaſe. The ſecond Queſtion was, What Eſtate this Term for 31 Years was? And he held it a Continuance of the firſt Term, and an Addition thereto, and not a Remainder or a future Intereſt; but 31 Years added to the former, all being under one *Habendum.* But ſome of his Brothers, he ſaid, differed from him in this Matter: but he took it ſo, as the moſt ſtrong againſt him: And altho' the 31 Years are not from the Time of the Death of *A.* but from the Day of his Death, it is all one, for the whole Day whereon he died is Part of the firſt 81 Years, if he ſhould ſo long live, and the next 31 Years ſhall be adjoined thereto, and no Fraction of a Day, but the laſt Day of the 81 Years, and the firſt Day of the 31 ſhall be conjoined, and make up one entire Term; and it is not to be ſuppoſed that he ſhould ſurvive the 81 Years, and ſo finiſh one Term before the other ſhall commence; for it is to be ſuppoſed, that he was 21 when he took the Leaſe; And *David* ſays, *That 70 Years is the Age of a Man*, and long Terms are conſidered in Law, for they make a Mortmain, and of them ſhall be a Wardſhip. But if the Power had been only for 30 or 40 Years, then it would be otherwiſe, for thoſe might be ſuppoſed to determine before the Life of a Man, and not a Term

Term for 80 Years; and ſo he concluded, That both the Terms being to the ſame Perſon, makes only one Term, as a Leaſe to one for three Years, and ſo from three Years to three Years, makes but one Term of ſix Years: But if the 31 Years had been to another Perſon, this would be a Remainder or future Intereſt; and he ſaid, That all his Brothers agreed with him, that it could not be preſumed that the Leſſee would ſurvive the Term of 80 Years. Then 3*dly*, Admitting it to be one and the ſame Term, which is the moſt ſtrong againſt him; for if the 31 Years was a future Intereſt, as his Brothers took it, then it would be more eaſy to maintain that the Judgment ought to be given for the Plaintiff, for then the Leſſee was never poſſeſſed thereof, and then the Entry of the Leſſor cannot turn it to a Right, and it is then well aſſigned * out of the Land. But taking it for a certain Term, yet he ſaid it was not turned to a Right by the Entry of the Leſſee; for that he never was poſſeſſed by Virtue of the Term, but only by Diſſeiſin; and the Leſſor had Reaſon, and might enter to purge the Diſſeiſin; and he put the Caſe, If a Stranger had after *Michaelmas*, entered and diſſeiſed the Leſſor, this could not turn the Term to a Right, into which the Leſſee had never entered; no more ſhall it where the Leſſor himſelf enters, wherein the Leſſee hath never entered; and ſo he concluded, That his whole Term was at the firſt a future Intereſt, and that the Leſſee was never poſſeſſed thereof, and ſo the Entry of the Leſſor cannot turn it to a Right; *and ſo it is well aſſignable at a Place out of the Land.* But ſome of the other Judges, as it ſeems, took the laſt thirty-one Years to be a diſtinct Term, and a future Intereſt, and never diſplaced; and ſo that Term (of which the Queſtion is, for the eighty-one Years determinable as aforeſaid was ended) was well aſſignable. And Judgment was given for the Plaintiff.

* P. 47

Leſſee of a future Intereſt enters, not by Virtue of the Term, but before, and continues after the Term begun. The Leſſor ouſts him: he may aſſign his Term without Entry.

Brice againſt *Carre*, *Emerſon* and others, Executors of *J. S.* Common Pleas.

COVENANT on a Writing ſealed, by which the Defendants Teſtator acknowledges himſelf to be accountable for all ſuch Monies as ſhould be charged by

Covenant lies on a Writing, by which the Defendant co-

venants to be accountable for 100*l.*
S. C. 1 Keb. 155.
Vid. 1 Saund. 47, 48, *&c.*
Poſt, 57.
2 Vent. 25, 99.
Yelv. 277.
2 Lev. 26, 68, 124.

by him on *A.* to be paid to *B.* and ſays, That he charged *ſo much* on *A.* to be paid to *B.* and that he had not paid it; for which he brings this Action againſt the Defendants, his Executors; and it was moved by Serjeant *Bernard*, That *Covenant* did not lie on ſuch Words in a Deed, but it ought to be *Account*; and cited 1 *Cro. Gury* againſt *Reaſon*; and though now Account lies not againſt Executor, yet that ſhall not be turned into *Covenant* againſt the Executor, which was not a Covenant againſt the Teſtator. But (by the Court) it well lies, and ſo would it do on any Words in a Deed, purporting an Agreement for the Payment of Money: Then he moved, That there is not any Notice given how much the Money was, and that it was not paid over. But thereto the Court anſwered, That he having undertaken it, and the Perſon being certain, ſo that he could inform himſelf; and the Agreement * not being to pay it on Notice, the Defendant is obliged to take Notice himſelf. And gave Judgment for the Plaintiff.

No Notice of a Thing to be done by a Perſon certain, who has undertaken.

* P. 48
1 Mod. 86, *&c.* 301, *&c.*

Anonymus.

Trover *de uno pullo.*
S. C. 1 Sid. 66.
1 Keb. 144, 176.
Vid. 2 Lutw. 1489 Style 31.
Nelſon's Lutw. 478, 479, 480.
5 Mod. 324, 325.

TROVER was brought, and among other Things declared *De uno Pullo:* After Verdict Judgment was ſtayed, for that as to the Word *Pullus*, it is uncertain what was intended thereby; for *Pullus* is *Latin* for the Young of any Thing, and if it had been with an *Anglice* a Colt, it had not been good, but it ought to be *pullo equino, Anglice* a Colt: Then the Plaintiff moved to diſcontinue that he might commence another Action. But it was ſaid by the Court, This cannot be after a Verdict, by the Stat. 2 *H.* 4. 7. (*Quære.*)

No Diſcontinuance after a Verdict.
Poſt, 227, 298.
contr. 2 Lev. 118, 124. Vide 1 Mod. 13. 41. 2 Danv. 156. 1 Sid. 60, 84, 606.

Webb againſt *Martin.*

Promiſe to do a Thing on Requeſt, the Action ariſes on the Re-

ASSUMPSIT, in Conſideration that the Plaintiff would deliver to the Defendant ſuch a Deed; the Defendant promiſed that he would re-deliver it to him on requeſt; and alſo in Conſideration that he had upon requeſt

requeſt delivered to him another Deed, the Defendant promiſed to pay him 40*l.* and alledges, That he had delivered to him the firſt Deed; and although at ſuch a Day afterwards he made Requeſt, yet he had not redelivered the firſt Deed, nor paid the 40*l.* The Defendant pleads the Statute of Limitations, and that he did not promiſe within ſix Years before the Action brought; whereupon the Plaintiff demurs, for the Cauſe of Action as to the firſt (Deed) did not ariſe on the Promiſe, but upon the Refuſal after Requeſt, and the Requeſt was within ſix Years. And ſo held the Court. Then it was moved, that the Payment of the Money was to be without Requeſt, and therefore the Plea was good as to that: To which it was anſwered, That the Plea being intire to both Parts of the Declaration, and being ill in Part, is ill in the Whole; whereupon it was adjourned. But at a Day afterwards the Court held the Plea ill in the Whole, for the Reaſon alledged; and they cited a Caſe between *Bridges* and *Ade*, to have been ſo adjudged. And gave Judgment for the Plaintiff for the Whole.

queſt, and the Statute of Limitations not pleadable to the Promiſe. S. C. 1 Keb. 177, 197. 1 Sid. 66.

Statute of Limitations pleaded to two Things, where not pleadable to one, is ill for the Whole. Poſt, 110, 191. Ante 31. 1 Saund. 37. 3 Lev. 367. 2 Saund. 66, 121, 125.

* *Jones* againſt *Philpott*. * P. 49

IN Ejectment on a Special Verdict, the Caſe was, Huſband and Wife Tenants in Special Tail, of the Proviſion of the Huſband, the Remainder to the Heirs of the Huſband, make a Feoffment in Fee, having two Sons, to the Uſe of themſelves for their Lives; the Remainder to the ſecond Son in Fee; the Huſband dies, the Wife enters and infeoffs the ſecond Son in Fee; and Wife dies, the elder Son enters: And it was adjudged by the whole Court, That his Entry was lawful, for that the Wife on the Death of the Huſband was remitted; for although that ſhe coming in by the Statute by way of Uſe, could not be remitted by the Limitation of the Uſe by the Statute, according to *Townſend*'s Caſe, in *Plowd. Com.* yet her Entry being lawful, ſhe is remitted by her Entry; and then if this ſecond Feoffment made by her makes a Diſcontinuance, the Entry of the elder Son was lawful, as for a Forfeiture; by the Statute of 11 *H.* 7. And if it was not a Diſcontinuance (as they held, that it was not, being made to him in

Remitter by Entry of one who comes in by way of Uſe. S. C. 1 Keb. 187. 1 Sid. 63.

Tenant infeoffs the Reverſioner in Fee it is

no Diſcontinuance. Vide ante, 36, 37. Dyer 248. Co. Litt. 366. Mo. 93, 716. 3 Co. 50. 4 Co. 3. b. Cro. Jac. 173, &c. 614, 474.

whom the Reverſion in Fee was well lodged by the firſt Feoffment) nor forfeited, then the Entry of the elder Son is lawful, as Heir to the firſt Intail, the firſt Diſcontinuance being purged by the Remitter of the Wife; ſo that take it either way, let the ſecond Feoffment by the Wife be a Forfeiture or not, the Entry of the elder Son was lawful.

2 And. 44. Cro. El. 2. 514, 524. Cro. Car. 244. 1 Leon. 261. 2 Leon. 168. 3 Leon. 78. Yelv. 101. Noy 123. 1 Jo. 13, 254. Palm. 213, 218. Cruiſe on Rec. 154, 158, 161. 2 Bac. Abr. 93. 3 Com. Dig. 71, 72.

* P. 50

* *Barrow* againſt *Hewitt.*

A *Habeas Corpus* to the Juſtice of *Cheſter*, returned by the Chief Juſtice. S. C. 1 Keb. 187, 165, 210. 1 Sid. 64. *See* 6 Mod. 61.

A *Certiorari* was iſſued to the Juſtice of *Cheſter*, or his Deputy; and returned and ſubſcribed by ſuch a one Chief Juſtice; and it was moved to be an ill Return, becauſe not by the ſame Perſon to whom directed; whereto it was anſwered by *Buck*, That *Juſtice* is the Subſtance, and *Chief* is no more than Ornament; and he cited 2 *Cro.* 368. & *Hob.* 135, 138. and a Caſe lately in this Court, between *Harriſon* and *Munford*, where a Writ was directed to the Juſtices of *Ely*, and returned by the Chief Juſtice of *Ely*, and adjudged good. And after divers Motions the Court held the Return good in this Caſe.

Ramſy againſt *Atkinſon.*

A Promiſe within the Juriſdiction, in Conſideration of a Thing not appearing to be done within the Juriſdiction is ill. S. C. 1 Keb. 128, 190. 2 Sid. 65. 1 Vent. 28. 2 Danv. 301. Vide poſt, 69. 96, 104, 137, 156, 208. 289. 1 Vent. 2, 72, 28. 1 Sid. 15, 180, 82. 1 Mod. 32, 63. 1 Saund. 74. 2 Mod. 131. 2 Show. Caſe 430.

ERROR of a Judgment in the Palace-Court in an *Aſſumpſit*, wherein the Plaintiff had declared, That the Defendant, in Conſideration that the Plaintiff at his Requeſt, had taken Pains to procure him a Leaſe of a Meſſuage in *Holbourn*; he promiſed at *Southwark*, within the Juriſdiction of the Court, to pay him 10*l.* and had not paid it. And the Error aſſigned was, That it is not alledged, that *Holbourn* where the Meſſuage is, is within the juriſdiction of the Court; and the Jury is to try not only the Promiſe, but alſo the Conſideration, *viz.* The Pains in taking the Houſe, and this they cannot do if it be not within their Juriſdiction; and for this Cauſe after Argument, the Judgment was reverſed.

The

* The Lady *Chaworth*'s Caſe. * P. 51

HER Huſband Mr. *Smith* had confeſſed a Judgment againſt himſelf and his Wife, as for a Debt due by the Wife whilſt ſole; whereas upon Examination it appeared, That the Debt was contracted after the Coverture, and this done by Practice for taking the Wife in Execution: But now it appearing, that the Huſband was taken in Execution alſo, the Wife was diſcharged; for the Huſband being in Execution, the Wife ſhall not be ſo alſo, ſuppoſing the Contract to have been before the Marriage. But this being done by Practice, the Court ſaid, If it could be made appear who was guilty of the Practice, they would puniſh them.

Huſband and Wife taken in Execution, and ſhe diſcharged. S. C. 1 Keb. 194. Vide ante 1. 1 Mod. 8. 135. 1 Keb. 189, 198, 637 2 Keb. 355, 442. 1 Sid. 29. 395. 6 Mod. 17, 106.

Term.

Term. Sanct. Hill.

ANNO

13 & 14 Car. II. in Banco Regis.

Bill againſt *Neal.*

Words ſpoken of a Juſtice of Peace. S. C. 1 Sid. 67. Vide poſt, 280. 1 Vent. 50. 1 Mod. 22. 1 Sid. 432. N. Lutw. 409. Hawk. P. C. 261.

ACTION on the Caſe, for that the Defendant ſaid of him, being a Juſtice of Peace, *He is a Fool, an Aſs, a Beetle-headed Juſtice.* After Verdict, it was moved in Arreſt of Judgment, That the Words are not actionable, for they ſound only in *Diſability* and not *Criminally.* But on the other Side it was ſaid, That the Words are ſcandalous of him, and import his unfitneſs to be a Juſtice of Peace, and are a Cauſe to remove him from his Office; and they cited 1 *Cro. Pead* againſt *Jones. Dunce of a Lawyer, and he will get little by the Law,* which were adjudged actionable. And in the ſame Book, *Cawdry* againſt *Highly,* Words ſpoken of a Phyſician, *He is a drunken Fool, an Aſs, never was Scholar, nor fit to ſpeak to a Scholar,* adjudged actionable; And here thoſe Words charge the Plaintiff with Indiſcretion, and render him incapable of the Office of a Juſtice of Peace. But it was adjudged by *Foſter,* Chief Juſtice, *Wyndham* and *Twyſden* againſt *Mallet,* That thoſe Words are not actionable, and cited 2 *Cro.* 58. *Biſcoe* againſt *Hollis,* as a ſtronger Caſe than this, and *Hammond* and *Kingſmill's* Caſe in this Court, 7 *Jac.* 1. where, for ſaying of a Juſtice of Peace, *He is a debauched Man, and unfit to be a Juſtice,* it was adjudged, no Action lay; and Juſtice

Styl. 22 & 210.

Twyſden

Twyſden ſaid, That Words which ſound in *Diſability* only, are not actionable, except they are ſpoken of one who gains his Living by that Thing (Profeſſion) wherein the Words do diſable him. *Mallet* held theſe Words actionable, being ſpoken of a Magiſtrate. But all agreed, That the Defendant deſerved to be bound to his Good Behaviour for his * Sawcineſs of a Magiſtrate. Whereupon the Counſel of the Plaintiff moved immediately, That he might be bound to his Good Behaviour; but thereto the Court anſwered, That the Court could not do it without a *Supplicavit* firſt made, and before the *Supplicavit* there ought to be a Bill of the Complaint filed. But *Foſter*, Chief Juſtice, ſaid, That if any would ſue to him for a Warrant for the Good Behaviour, he would grant it; But as to the Action, they gave Judgment for the Defendant.

* P. 53

Sheppard againſt *Wakeman.*

CASE, where the Plaintiff was to be married to ſuch a one who intended to take her to his Wife; the Defendant falſly and malicioufly to hinder the Marriage, writ a Letter to the ſaid Perſon, That the Plaintiff was contracted to him, whereby ſhe loſt her Marriage. After Verdict for the Plaintiff, it was moved, That the Action did not lie, the Defendant claiming Title to her himſelf, like as *Gerrard*'s Caſe, 4 *Co.* for Slander of Title. But after divers Motions, the Plaintiff had Judgment, for it is found to be malicious and falſe; and if ſuch an Action ſhould not lie, a mean and a baſe Perſon might injure any Perſon of Honour and Fortune by ſuch a Pretence.

One claims a Contract of Marriage with a Woman, by which ſhe loſt her Marriage. S. C. 1 Keb. 275, 269, 303. &c. Poſt. 247. V. 1 Saund. 228. 1 Salk. 14, 15.

Anonymus.

A MAN being cheated in a Tavern in *London*, and having given a Judgment for the Money, moved here to have the Judgment reverſed for the Fraud; and the Court for the preſent ruled the Execution to be ſtayed till the Matter be examined: And *Foſter* and *Twyſden* adviſed the Party to bring an Information againſt

Lindners to ſerve on a Jury out of *London*, where the King is Party. 2 Shower's Caſe ult. Vide Poſt. 56 1 Keb. 840.

againſt the Cheat, and alſo againſt the Vintner in whoſe Houſe it was, in this Court: For they ſaid, That the Privilege of *Londoners* not to be returned of Juries out of the City, extended only to Caſes between Party and Party, and not (to Caſes) where the King is Party.

* P. 54

* *Neave* againſt *Nelſon.*

Privilege of the Party pleaded to the Juriſdiction after a ſpecial Imparlance. S. C. 1 Keb. 195, 221, 256. 1 Salk. 1. V. 1 Mod. 23, 118. 5 Mod. 310. 1 Salk. 193. 6 Mod. 26, 106.

DEBT in the King's Bench againſt an Attorney of the Common Pleas, who imparls ſpecially, with ſaving to himſelf all Exceptions, and afterward pleads his Privilege, whereupon the Plaintiff demurs. And it was objected, that Privilege is not pleadable after ſuch an Imparlance: But if he would have reſerved Liberty to plead to the Juriſdiction of the Court, he ought to have ſhewn it ſpecially in his Imparlance; and not only as here *(ſalvis, &c. tam ad Breve quam ad Billam, &c.)* but alſo to the Juriſdiction; the others are only as to the Perſon and the Action, and not to the Juriſdiction of the Court; and cited 7 *H.* 6. 37. 22 *H.* 6. 7. alſo the Plea is not averred as it ought. *Wyndham* and *Twyſden* held at this Time the Plea to the Juriſdiction, receivable on this Imparlance: But it was adjourned. And afterwards in the following Term, a *Reſpondeas ouſter* was awarded for the Fault of the Plea in wanting an Averment; But nothing further was ſpoken of the ſpecial Matter. But afterwards in *Michaelmas* Term, 18 *Car.* 2. in this Court, entered *Trin.* 18 *Rot.* 121. between *Truſſel* and *Maddox*, it was adjudged, That a Plea to the Juriſdiction is not to be received after ſuch an Imparlance, which you may ſee hereafter reported at large. p. 188. *(Sed Quære.)*

Q. *Ruſſel* v. *Maddock.* Poſt. 188.

Sayer againſt *Glean.* In the Common Pleas.

Bottomry Bill with exceſſive Intereſt. S. C. 1 Sid. 27, 28. 2 Danv. 77. Pl. 15. V. 1 Keb. 358. 711.

DEBT† on an Obligation conditioned, That if a Ship ſent to Sea, or the Goods (therein) or the Obligor returns ſafe, to pay him the Sum, beyond the Uſe allowed by the Statute for the Loan of 100*l.* and alſo the 100*l.* And upon Demurrer it was objected, That it was an uſurious Contract, and the Bond void, becauſe

becauſe the Payment depended upon ſo many Things, one of which in probability muſt happen. Though if it had been on the Return of the Ship only, it might be good. But it was reſolved by *Bridgman* and the whole Court, That it was a good Bill of Bottomry, and tolerable by the Uſage among Merchants, and allowable by reaſon of the great Perils of the Sea, and not like to the Caſe in 5 *Co.* where the Condition was to * pay within ſix Months, if one of the three Perſons were in Life; for by the ſame Reaſon then it might be ſo for ten Lives. *Secondly*, The Defendant here having pleaded, That the Obligor died before the Return, and the Plaintiff having demurred thereupon without Aſſignment of any Breach, it was objected, That the Plaintiff could not have Judgment. But to that it was anſwered and reſolved, That the Defendant having pleaded a collateral Plea, and that being defective, had ſaved the Plaintiff the Labour of aſſigning a Breach, and had given the Plaintiff the Advantage of putting himſelf on the Judgment of the Court, whether the Plea be good or not; and this before he comes to make any Replication, *Yelv.* 78. But if the Plaintiff had admitted the Plea, and made a Replication, which ſhewed no Cauſe of Action, it would have been otherwiſe (ſaid *Bridgman.*) *Thirdly*, it was objected, That the Defendant had Election to pay upon which of the Contingents he would, and of one of them he is deprived by the Death of the Obligor, and therefore is excuſed of all. But to this it was anſwered and reſolved, That all thoſe Things being contingent and uncertain which of them would happen, the Law ſupplies theſe Words, *which ſhall firſt happen*; and it ſhall be expounded, to pay at which of the Contingents ſhall firſt happen; and ſo foreclose the Election of the Obligor, and give it to the Obligee to take the Action on which of the Contingents ſhall firſt happen: And it is not like the Caſe where one is Obligee to pay a Sum at *Michaelmas* or *Lady-day*, if he were then in Life, and he died after *Michaelmas* and before *Lady-day*, as *Bridgman* ſaid. And Judgment was given for the Plaintiff.

Cro. El. 330. 2 Sid. 107. 1 Vez. 164. 3 Wils. 390. 1 Hawk. P. C. 530, 532. 2 Bl. Rep. 859, 861, 865. Doug. 285. 1 Br. Ch. Caſ. 93.

* P. 55

3 Term. Rep. 531. 1 Atk. 340.

Defendant pleads to the Obligation, and Plaintiff excuſed from aſſigning a Breach.

Condition to pay on one of three Contingents, he is to pay on the firſt. *See* 2 Danv. 77. 2 Sid. 107.

Foſter

Foſter againſt *Foſter*.

Agreement to convey to the Son, will not raiſe a Uſe. S. C. Raym. 43. 1 Sid. 82. 1 Keb. 160, 225, 274. Vide 1 Mod. 147. Ante 30. Poſt, 171.

* P. 56

2 Lev. 9, 76, 213, 223, 226. 3 Lev. 126, 306, 372, &c. *Ibid.*

Conſideration of Natural Affection and 20*l.* 2 Lev. 76, 77. 3 Lev. 126, 306.

EJECTMENT, and upon a Special Verdict, the Caſe was, *Margery Foſter* being ſeized, there was a Deed made between her and her Son *William Foſter*, in this Manner. Articles of Agreement for Conveyance of, &c. the Tenements in Queſtion. *Imprimis, The ſaid* Margery *in Conſideration of* 20*l. hath bargained and ſold, demiſed and granted, and doth hereby bargain and ſell, demiſe and grant*, &c. *to* Matthew Foſter, *the Tenements in Queſtion, To have and to hold to him and his Heirs * for ever, ſhe to have it during her Life, and alſo ſhe to have his Barn during her Life for her third Part*, &c. And the Jury find, That the Articles were made as well in Conſideration of Natural Affection, as of 20*l.* but no Execution by Livery or Inrollment; and afterwards ſhe made Feoffment of thoſe Lands to *Nicholas Foſter* the Defendant, againſt whom *Matthew Foſter* brought the Ejectment; and the Queſtion was, Whether thoſe Articles amount to a Covenant to ſtand ſeized to the Uſe of *Matthew?* And it was after Argument adjudged in *Trinity* Term, 14 *Car.* 2. for the Defendant, That the Articles did not raiſe any Uſe, but reſted only in Covenant, and as preparatory Agreements: It was agreed, That though the 20*l.* is the Conſideration expreſs, yet the Jury may find the other Conſideration of Affection. And *Twyſden* ſaid, That a Covenant in Conſideration of 20*l.* to ſtand ſeized to the Uſe of my Son, is not good without Inrollment, but a Covenant in Conſideration of 20*l.* and Affection, is good without Inrollment, becauſe both Conſiderations are expreſs; but all agreed, That in this Caſe no Uſe ſhould ariſe, and that the Deed reſted only in Agreement. And this appears, *Firſt*, From the Title, *viz. Articles*, &c. *Secondly, She to have all for her Life*; which is but an Agreement that ſhe ſhould have it. *Thirdly, That ſhe ſhould have his Barn*; this reſts only in Covenant, and if the Eſtate ſhould paſs to her by way of Uſe, and ſhe have Covenant only for the Barn, it would be unequal.

Count

Count of *Standford* againſt *Nedham.*

IN *Scandalum Magnatum*, and the Action laid in *London*; the Defendant moved to change the *Venue*, For that he was prohibited to ſtay in *London*, having been in Arms againſt the King: But the Motion was denied, for the Plaintiff is a Peer of the Parliament now ſitting at *Weſtminſter*, and has Election to lay his Action where it is moſt convenient for himſelf; and the rather in this Caſe it ought not to be removed, becauſe this Action is as well on Behalf of our Lord the King, as himſelf.

Venue not changed in *Scand. Mag.* S.C. 1 Keb. 514. 1 Sid. 143. Vide Ante 39. Raym. 74.

Ante 53.

* The *King* againſt *Alicock.*

* P. 57

HE was convicted of Treaſon for ſpeaking thoſe Words, *The King is a Baſtard, his Mother is a Whore, he is gone to convey the Whore out of the Kingdom*, (the King being then gone to leave his Mother at *Portſmouth*, in order for her Tranſportation to *France*) *but may come ſhort home, if I meet him I will kill him*; And on the Trial at the Bar the Court held the Words Treaſon: But it appearing that the Witneſſes were of ill Fame, and inhabiting in a ſcandalous Part of the City, where the Defendant had oftentimes diſturbed them, being four or five, and ſome of them Women of ill Fame; and it being proved that they had conſpired to rid him out of their Way, the Jury found him Not guilty. See the Stat. 13 *Car.* 2. *Stat.* 1. *cap.* 1.

Indictment for treaſonable Words. Vide Kelynge 13. H. P. C. 13. 3 Mod. 53. Yelv. 107. 197. Palm. 426. 1 Roll. Rep. 185. 2 Roll. Rep. 90. Foſter's Cr. Law, 202. 1 Hawk. P. C. 58.

Brown againſt *Brown.*

COVENANT on an Indenture, whereby the Defendant grants a Fee-Farm-Rent to the Plaintiff, which he had purchaſed of the late Truſtees for the Sale of the King's Tenements, and covenanted, That he was ſeized in Fee, and had good Right to ſell; and aſſigns a Breach, that he had not good Right: The Defendant pleads, That it was further agreed in the ſame

Covenant general reſtrained by a particular Covenant ſubſequent. Vide ante 47.

ſame Indenture, That all the Covenants in the Indenture ſhould not extend further than to Acts done by the Vendor and his Heirs, whereon the Plaintiff demurs; and there being a remote Agreement in the End of the Deed, far diſtant from the other Covenant, it was adjudged, That it had qualified the firſt Covenant, and reſtrained it to Acts done by the Covenantor himſelf only; as in *Nokes*'s Caſe, 4 *Co.* whereupon it was adjudged for the Defendant.

* P. 58

* *Harris* againſt *Knipe.*

An Award of mutual Releaſes, without any other Thing on one Part, yet good. Vide 1 Roll. Abr. 263, 264. Poſt, 133. 2 Saund. 292, 293. 3 Lev. 188.

DEBT on an Obligation to perform an Award, and in the firſt Part of the Award it is awarded, That all Suits and Controverſies ſhall ceaſe, *&c.* and though in all the Award afterwards nothing is well awarded, but only on one Part; yet it was agreed by the Court, That this is a good and mutual Award on the firſt Party only.

2 Lev. 235. Comyns Rep. 328.

Lady *Dacre*'s Caſe.

Ejectment of a Stable, Orchard, Cottage, *&c.* Vide Hard. 57, 59. 76, 173. 330. Style 215. Cro. El. 818. Cro. Car. 555. 1 Jo. 454. 2 Danv. 753. Palm. 337, 338. 3 Lev. 97. Poſt, 114, 213. Runnington on Ejectm. 28. 1 Term. Rep. 11.

EJECTMENT was brought among other Things *de uno Stabulo:* After Verdict it was moved in Arreſt of Judgment, That an Ejectment does not lie of a Stable; but on view of Precedents in the Common Pleas, of Recoveries ſuffered of a Stable, it was reſolved it well lay; as alſo of an Orchard, and of a Cottage. And *Twyſden* ſaid, That though an Ejectment would not lie of a Croft, yet it will lie of a Croft called *Black Acre*; for this is certain enough to be delivered in Execution; and ſo, he ſaid, it was adjudged in one *Fairbeard*'s Caſe.

Hunt againſt *Hurlewood.*

Damages in the Whole above the Particulars, good,

ASSUMPSIT of ſeveral Particulars of divers Values, which amount to 69*l.* 9*s.* but by a miſcaſting at the Foot it was made to amount to 70*l.* 14*s.* And after Verdict

Verdict this being moved, It was resolved, That the Jury not having given more Damages than 69*l.* 9*s.* it is well; but otherwise it had been, had they given above the 69*l.* 9*s.*

if the Jury give no more than the Particulars. Vide 2 Show. 56, 88, 52, 103. Nelson 1 Lutw. 247.

* *Collingwood* against *Pace* in the Exchequer-Chamber. * P. 59

IN Ejectment in the Common Pleas on a special Verdict, the Case was, That *Ramsey*, an Alien *Scot*, before the Union, had issue four Sons, *viz. Robert*, *Nicholas*, *John* and *George*, *Robert* had Issue, three Daughters now living. *Nicholas* had also Issue two Sons *Patrick* and *William* yet in Life. *John* had no Issue; *George* had Issue the Lessor. *John* being seized of the Lands in Question, devised them to the Heir of *Nicholas* and his Heirs. *John* and *Robert* being before naturalized by Act of Parliament, with Words, That they should inherit to any Ancestor lineal or collateral, as fully to all Intents and Purposes, *as if they had been natural Subjects born in* England. *John* and his Wife are dead, and also *George*. *Patrick* the elder Son of *Nicholas*, enters as Heir of *Nicholas*, claiming by the Devise, against whom the Lessor brought Ejectment, as Son and Heir of *George*, and Brother and Heir of *John*. And this Case being argued in the Common Pleas, two Points were made; 1. If the Devise to the Heir of *Nicholas* was good? And resolved by *Bridgman* and the whole Court, That the Devise was void, first, because *Nicholas* was alive, and none can be Heir to a living Person. 2*dly*, *Nicholas* being an Alien cannot have any Heir by our Law; an Heir he might have in *Scotland*, but not in *England*, where the Lands are which this Devise concerns; and so it was agreed by all, That the Defendant had no Title. But then the Question was; 2*dly*. Whether the Plaintiff had any Title, or whether the Lands should escheat? And thereupon the Question was, If *John* and *George* being Aliens, Sons of an Alien, may be Heirs or inherit to one another by the Act of Parliament, being naturalized as aforesaid? And it was held by *Bridgman* and *Tyrrel*, That they cannot inherit to

Devise to the Heir of one who is alive, or to the Heir of an Alien, is void. 1 Sid. 193. 2 Sid. 23, 51, 108, 194. Vaugh. 274. 1 Keb. 65, 174, &c. 2 Jo. 10. 1 Vent. 413, &c. 2 Vent. 1. Hard. 224. Hob. 29. Raym. 163, 330. 2 Mod. 291. 2 Jon. 99, 212. Mo. 860. 3 Lev. 330, &c. 2 Danv. 515. Vide 2 Lev. 232.

Two Brothers Aliens naturalized, they and their Heirs shall inherit the one to the other.

to one another, according to the Opinion of 1 *Co. Inſt.* 8. *a.* becauſe they do not derive any inheritable Blood from their Father; and *Hobbie's* Caſe, *Noy* 158, 159. But they agreed, where a Man had two Sons and afterwards is attainted, the Sons ſhall inherit to one another, becauſe they had inheritable Blood derived from their Father and Mother before the Attainder, which cannot be extinguiſhed by the Attainder afterwards; and for this Reaſon each of them might inherit from their Mother ſuch * Lands as came by her. But if the Attainder had been before the Birth of the Sons, it would have been otherwiſe. And they agreed with the others, That the being of Daughters of *Robert* the elder Brother, would not prevent the Deſcent, as it would have done, had they been at once (together) legal Heirs and attainted. And the Court being divided, *Hide* and *Brown*, Juſtices of the Common Pleas, being of the contrary Opinion, the Caſe was adjourned into the Exchequer-Chamber before all the Juſtices of *England*, where *Kelynge*, then a Juſtice of the King's Bench, joined in Opinion with *Bridgman* and *Tyrrel*, who adhered to their former Opinion. But *Hyde*, then Chief Juſtice of the King's Bench, and *Brown*, ſtill Juſtice of the Common Pleas, retained their former Opinions, and with them joined in Opinion, *Hale* Chief Baron, *Twyſden* and *Wyndham* Juſtices of the King's Bench, and *Atkins* and *Turner* Barons of the Exchequer; and they held, That by Virtue of the Act of Naturalization, *John* and *George* were inheritable the one to the other, and ſo the Leſſor, Son of *George*, was inheritable to thoſe Lands as Heir to *George*; and they held, That if an Alien has two Sons born in *England*, the one ſhall inherit to the other, tho' neither of them could inherit to the Father, for the Deſcent between them is immediate, and they ſhall make their Title in a *Mortdanceſtor*, *&c.* as Heir to the Brother, without mentioning the Father: And this anſwers the Objection, which was made on the other Side, and ſtrongly inſiſted on, That altho' the Act enables them to inherit to any Anceſtor lineal or collateral, it is reſtrained by the Words *as if they were born in* England: And *Bridgman* and thoſe of the other Side, ſaying, That two Brothers born in *England* of an alien Father, could not inherit to one another; all the Judges of this Side denied it, and for this

* P. 60

Vide Co. Lit. 8 391, 392. Cro. Jac. 539. Noy 159. Golb. 279. Pal 13, 16, 18. 1 Vent 418, 419. 2 Roll. Rep. 92. 93 113, 420, 424. 1 Sid. 195. 200. 2 Sid. 23, 24. Hard 224. 1 Danv. 321, 322. 2 Danv. 552, 553, 554. 2 Hawk. P. C. 648, 649.

this cited *Godfry* and *Dean*'s Caſe, 2 *Cro.* and they denied that which is ſaid in *Co. Lit.* 8. *a.* which is not there ſpoken as the Opinion of *Coke* himſelf; But he ſays, *That ſome have ſaid*, That if the Father be attainted, and afterwards have two Sons born, the one ſhall not inherit to the other, becauſe they never had any inheritable Blood derived from their Father; and the Words of the Act of Parliament which ſay, *He ſhall be inheritable to any Anceſtor lineal or collateral*, would be vain, if he being deſcended from an alien Father could not have any Anceſtor. And afterwards in *Eaſter* Term, 16 *Car.* 2. Judgment was given for the Plaintiff by the Opinions of the ſaid ſeven Judges againſt the ſaid three, That the one Brother ſhall inherit to the other by Virtue of the ſaid Acts of Naturalization.

Termino

Termino Paſchæ,

ANNO

14 Car. II. in Banco Regis.

The *King* againſt *Okey*, *Barkſtead* and *Corbet*.

Perſons attainted, tried whether the ſame Perſons, &c. S. C. 1 Keb. 244. 1 Sid. 72. Keel. 13, 14. Vide Poſt, 63. 2 Hawk. P. C. 21. 546, 549.

THEY having been attainted by Act of Parliament for the Murder of King *Charles* the Firſt, being three of his Judges, which ſate in the High Court of Juſtice, as they called it; and having eſcaped, and retaken, and being brought to the Bar, and demanded, Whether they were the ſame Perſons in the Act mentioned; they ſaid they were of the ſame Names, but there might be divers Perſons of the ſame Name: But they (further) ſaid, That the Court ought not to proceed againſt them without having a Record of their Attainder here in Court, as was done in Sir *Walter Raleigh*'s Caſe, where the Indictment, tho' long before, was (made) a Record of this Court, and produced. And thereupon the Record of the Act of their Attainder being removed by a *Certiorari* into Chancery, and thence ſent hither by a *Mittimus*, was read unto them; whereupon they pleaded, that they were not the ſame Perſons, and Iſſue was taken thereon, and a Jury returned immediately to try it, which was done, and they (were) not permitted to challenge peremptorily, for they are not now to be tried for the Treaſon, but (only) of the Identity of Perſons; and the Jury found them the ſame Perſons; and thereupon Sentence of Execution was immediately given, and three or four Days afterward they were executed at *Tyburn*.

The

* The *King* againſt *Kimberty* and *Mary North*. * P. 62

THEY were indicted for conſpiring to indict *J. S.* for having begot a Baſtard on the Body of the ſaid *Mary*, with intent to extort Money from him. After Verdict and Motion in Arreſt of Judgment, it was reſolved, That the Indictment lies for the meer Conſpiracy, without any Indictment or other Act done, as 9 *Co.* 56. *b.* the Poulterer's Caſe; but the Court would conſider what Puniſhment they ſhould have.

An Indictment lies for conſpiring only, without other Act done. S. C. 1 Keb. 203, 254. Vide 2 Show. 2 2, 3. Poſt. C. L. 221. Hawk. P. C. 348.

And *Note*, afterwards in *Hillary* Term, 15 & 16 *Car.* 2. *B. R.* The King againſt *Sterling*, an Indictment for Conſpiracy to depauperate the Exciſe-Men, was adjudged good.

Poſt. 125, 126.

Nevill againſt *Hancerton*.

CASE (was brought) and declares, That he had Common in three Acres, and the Defendant had encloſed two of them: the Defendant pleads, That he had a Houſe there, and made the Incloſure for the Enlargement of his Curtilage; Whereupon the Plaintiff demurred, and took theſe Exceptions to the Plea, *viz.* 1. That it is not ſaid to be an ancient Meſſuage; for which Cauſe *Twyſden* ſaid, the Plea was not good. But *Wyndham contra*, it being for Enlargement of a Curtilage, for the Lord may build a new Houſe for his Herdſman, and afterward enlarge the Curtilage, 2 *Inſt.* 476. 2*dly*. That it was unreaſonable to incloſe two Acres out of three. To which it was anſwered, That the Quantity is to be conſidered with the Quality of the Perſon. 3*dly*. That it is not averred that ſufficient Common was left; to which *Twyſden* inclined, *Wyndham contra*, ſaid, That it was to be averred only, where the Incloſure was for the Improvement of the Land, and not where it was for the Enlargement of the Curtilage. But afterwards in *Trinity* Term, the Plea was agreed by all (the Court) to be ill, becauſe it was not ſaid, That the Meſſuage was for his own Habitation,

One juſtifies the incloſing of Common, for the enlarging of his Curtilage. S. C. 1 Sid. 79. 1 Keb. 314, 283.

V. 1 Saund. 5, 6.

or of his Shepherd; for he might (perhaps) build a great Meſſuage to leaſe to a Nobleman, which might require a greater Curtilage than the Lord himſelf or his Herdſman: And therefore Judgment was given for the Plaintiff.

* P. 63

* *Porter* againſt *Harris.*

Covenant brought againſt two, and Judgment by Default againſt one, the other pleads Performance, which is found, the Plaintiff ſhall not have Judgment againſt the other. Vide 1 Sid. 76. 1 Keb. 284. Poulter *verſus* Ford.

COVENANT was brought againſt two for not building a Houſe for the Plaintiff according to their Covenant; Judgment was againſt one by Default, the other pleads Performance, and it is found for him; whereupon it was moved in Arreſt of Judgment, That no Judgment nor Writ of Inquiry of Damages, could be againſt him againſt whom the Judgment was by Default; becauſe although in *Treſpaſs*, one may be guilty and the other not, yet in Covenant, Debt or other Contract where it is joint, the one cannot be convicted without the other; and here by the Verdict for one of the Defendants, that the Covenant is performed, it appears now, That the Plaintiff had not any Cauſe of Action, and therefore ſhall not have Judgment, as *Tillies* and *Woodie's* Caſe is. *E.* 4. and ſo ſhould it be, although the Defendant againſt whom the Judgment is by Default had confeſſed the Judgment. It was alſo reſolved, That the Defendant ſhould have Coſts on the Verdict againſt the Plaintiff, for now it is a Verdict againſt him, and that he ſhould have neither Coſts nor Damages againſt the other.

Coſts, &c.

Earl of *Saliſbury's* Caſe.

Seizure of Copyhold until, &c. good without Cuſtom; but not a Seizure as forfeited without a Cuſtom. S. C. 1 Keb. 287. Vide poſt, 172. Ante 26. 2 Danv. 192, 198, 199.

IN Evidence to a Jury at the Bar, (on a Trial) in Ejectment, the Queſtion was, Whether the Heir of a Copyholder, not coming in to be admitted on Proclamation, if the Lord might ſeize the Land without a particular Cuſtom to do it? And it was held, That he might ſeize until the Tenant came in to be admitted without any Cuſtom but to ſeize as forfeited, he could not without a Cuſtom. Another Queſtion was, If in the Proclamation there ought to be particular mention of

of all the Lands by Name, as they are named in the Copy, or if a general Proclamation to come in and be admitted to all the Lands of his Anceſtor (were ſufficient?) And this was intended to have been found Specially. But afterwards the Parties agreed in Court.

Proclamation to come in to be admitted thereto, if it ought to name all the particular Lands.

* Sir *Henry Herbert* againſt *Pagett*. * P. 64

IN Caſe, Plaintiff declares, That where a Judgment was had againſt the Plaintiff in Caſe for Words, and the Judgment entered with a *Capiatur* inſtead of *Miſericordia*, he thereupon brought a Writ of Error to have the Judgment reverſed; but that the Defendant being Keeper of the Writs and Records of the Court, kept them ſo negligently, that the Record was amended, and made *Miſericordia*; and on (Iſſue) Not guilty and Trial at the Bar, although it appeared that all the Attornies of the Court had privilege to view the Records without controul, and that ſometimes they viewed many of them at the ſame Time, ſo that it was almoſt impoſſible to obſerve them all; and that many Times the Attornies amended their Judgments at any Time, if there were not a Rule to the contrary; and an ancient Attorney ſwore, That it had been often-times done even after a Writ of Error brought, before the Record removed; and thereupon it was inſiſted by the Defendant's Counſel, That the Defendant could not take Notice what they amended, or ought to amend: Yet by *Mallet* and *Wyndham* it was held, That though here appeared no Neglect or want of Care in the Defendant, yet he having taken upon him to keep the Records, he is at his Peril to anſwer for all the Miſuſage that is in the Records, and ſo is chargeable in the Action. *Twyſden* held the contrary, That he ought not to be chargeable, for that by no Induſtry he could prevent it; but foraſmuch as the Declaration recited, That the Writ of Error was from the Chief Juſtice, *&c.* directed to another Chief Juſtice, *&c.* but miſ-directed: All agreed that it was a Variance, for which the Plaintiff ought to be non-ſuited, and ſo he was.

An Officer chargeable for Defaults in his Office which he could not hinder. S. C. 1 Sid. 77. 1 Keb. 288.

* P. 65.

* *Orton* againſt *Fuller.*

Words.
3. C. Raym. 51.
1 Keb. 293, 303.
He is a perjured Rogue as well as I.

CASE was brought for Words, that the Defendant ſaid, *The Plaintiff ſays I am a perjured Rogue, He is a perjured Rogue as well as I:* After Verdict for the Plaintiff it was moved in Arreſt of Judgment, That the Words are not ſaid poſitively (of the Plaintiff) but relatively to the Defendant; and it is not averred that the Defendant is a perjured Rogue; as for ſaying *He is as very a Thief as any is in* Warwick *Gaol*, an Action does not lie without an Averment that a Thief was there. But it was ſaid by the Court, The Defendant had ſupplied the want of an Averment, in ſaying, *as well as I*, whereby he had confeſſed himſelf to be a *perjured Rogue*; and afterwards in *Trinity* Term Judgment was given for the Plaintiff.

Vide Poſt, 297.

Queen's College Caſe, *alias* Dr. *Patrick's* Caſe.

A Mandamus does not lie to a College where there is a Viſitor.
3. C. Raym. 101.
1 Sid. 346.
1 Keb. 289, 294, 298, 551, 610, 665.
Vide ante 23, &c. ib.
2 Lev. 14.

DR. *Patrick* being duly elected, as he thought, to the Maſterſhip of *Queen's College* in *Cambridge*, but denied to be admitted, and ſworn by the Senior Fellow, being of the Party of another who ſtood in Competition with Dr. *Patrick*; the Doctor prayed a *Mandamus*. *Twyſden* and *Wyndham* held, that it did not lie, for *Twyſden* ſaid, he knew they had a Viſitor. But by *Foſter* Chief Juſtice, Let the Writ go, and upon the Return it will appear whether they have a proper Viſitor; and the Writ was granted; but that not being returned, the next Term an *Alias* was granted and returned, and many Exceptions were taken to the Return, the moſt Part whereof afterwards appeared not to be material. But in *Hillary* 15 & 16 *Car.* 2. the Caſe was argued at the Bar by *Jones* for the Doctor, and by *Finch* the King's Solicitor, for the College; and now the Return was opened at large, *viz.* That they were incorporated by *Hen.* 7. *ad Studend' & Orand'* and to conſiſt of a Preſident and nineteen Fellows, and that all Differences between the Preſident and Fellows, ſhould be referred to, and determined by the Chancellor of the Univerſity and the major Part of the Heads of the Colleges

leges there. And they further * returned the Patent 2 *Jac.* 1. whereby the Statutes of the Colleges in the Univerſity are confirmed, and thereby it is appointed, That where no other is Viſitor, the Chancellor ſhall be Viſitor if he be preſent, and if abſent, the Vice-Chancellor, if he be preſent and appointed; and that Dr. *Marten* the late Preſident died ſuch a Day, and that Dr. *Patrick* was elected Preſident by ſuch a Number of the Fellows, and one other by ſuch another Number (being the greater) and admitted; and that the Chancellor was then abſent, but that the Vice-Chancellor was then preſent in the Univerſity, and that Dr. *Patrick* had not appealed: And it was much controverted, whether this were a Spiritual or a Temporal Foundation, *ad Studend' & Orand'*, and not agreed, ſome of the Judges holding the one way, and ſome the other: But the principal Point was, That here being a Viſitor appointed, Whether this Court could meddle with the Matter, be the Corporation either Spiritual or Temporal, for the Return was in ſome Things agreed not to be very good? And the principal Matter was argued at the Bar, in *Trinity* 15 & 16, and in *Michaelmas* the 16th; and in *Trinity* the 18th of *Car.* 2. And in *Hillary* the 18th it was argued at large by all the Judges, and *Kelynge* now Chief Juſtice (who before had been Counſel for *Patrick*) and *Moreton* the puiſne Judge held, That the *Mandamus* well lies, and that a peremptory *Mandamus* ought to go for admitting Doctor *Patrick*, and an Attachment againſt the Senior Fellow, for a Contempt on this Return, and not admitting him before. But *Twyſden* and *Wyndham* held the contrary; and that here being a Viſitor appointed, this Court had nought to do in the Matter, for the Founder intended that his College ſhould be free of all Foreign Suits, and that all Controverſies ſhould be determined within the Univerſity, to the Intent that they might the better follow their Studies: But by this Means, if they ſhould come hither upon every Controverſy, the Order and Rule of the Univerſities ſhould be overthrown; and the Viſitors are the proper Judges of their Laws and Statutes, and not this Court. And the Court being thus divided, it was conſidered whether this being a Cauſe of the Crown-Side, might be adjourned into the Exche-

* P. 66

quer

quer Chamber, and it ſeemed to ſome that it might, but it was not.

* P. 67 * *Note*, The Exceptions principally inſiſted on were; *Firſt*, That it is not returned, that the Vice-Chancellor was appointed Viſitor, and by the Return (it appears) he is not (to be) Viſitor if he be not appointed. And the Return is, That the Chancellor was abſent, and the Vice-Chancellor preſent: But it does not ſay that he was appointed. And *2dly*, They have not returned any Cauſe, wherefore they refuſed to admit Dr. *Patrick*; But return the ſpecial Matter as aforeſaid, but do not ſay which of them was duly elected, and yet they return, that Dr. *Patrick* had not appealed.

A Return may be vacated, but not taken off the File. Poſt, 93.

Note, The Parties being agreed, the Return in this Caſe was afterwards agreed to be vacated, becauſe it could not be taken off the File.

Term.

Term. Sanct. Trin.

ANNO

14 Car. II. in Banco Regis,

Sir *Henry Vane*'s Caſe.

HE being excepted out of the General Pardon, was indicted of High Treaſon committed before the King's Reſtoration; and after that the Indictment was read, he deſired it might be read again, which was done: But then he deſired it might be read in *Latin*, which was denied, it being never done. Then he deſired a Copy thereof, and Counſel, which was denied: But the Court ſaid, That if he took any legal Exception, he ſhould have a Copy of ſo much thereof as concerned the Exception, and Counſel to argue it. And then being tried and found Guilty, and being brought to the Bar at a Day afterwards, he tendered a Bill of Exceptions, which the Court refuſed to accept; For a Bill of Exceptions does not lie in criminal Caſes, but only in Actions between Party and Party. And he was afterwards executed on *Tower-hill* by beheading only.

A Copy of Indictment and Counſel denied in Treaſon. S. C. 1 Sid. 84. 1 Keb. 304. 315. 319. 324. V. Ante 61. 7 W. 3. c. 3.

No Bill of Exceptions in criminal Caſes.

At *Guild-Hall*.

AUDITA Querela on a Releaſe given after Judgment; the Iſſue was, That the Releaſe was made by *Dureſs*; and it being tried before *Bridgman*, Chief Juſtice of the

Dureſs cannot be, where the Party is in Priſon by the King's Writ.

Vide 1 Sid. 43, 74.

the Common Pleas, the Evidence was, That the Defendant not having good Cauſe of Action, cauſed the Plaintiff to be arreſted and detained in Priſon till he made the Releaſe, with Menaces, That he ſhould lie there *and Rot*, if he would not ſeal a Releaſe; whereupon he made the Releaſe, and was preſently diſ-

* P. 69

charged: And held by *Bridgman*, That he * being in Cuſtody of the Law by the King's Writ, it was not any *Dureſs* to be pleaded in Avoidance of the Deed, but being arreſted without Cauſe of Action, he had his Remedy by Action on the Caſe: But he offered to have it found ſpecially, if *Baldwin* would pray it, but he did not do it, and (ſo) the Jury gave their Verdict, That the Releaſe was good.

Anonymus.

A Writ teſted the Term that the Judgment was given, where the Action was commenced before. Qu. if good. Q. Raym. 244.

ERROR of Judgment in the Common Pleas, and want of an Original aſſigned, and upon Diminution alledged, the Judgment being of *Hillary* Term, with an Imparlance of *Michaelmas* Term, and the Judgment being of *Hillary* Term when the Original is given, tho' in the Common Pleas an original ſued returnable the ſame Term, that the Judgment is given, is good; yet it is not ſo to be allowed here, where the Record is all made up of the ſame Term, as they generally do without an *Alias prout patet*, *&c.* But in this Caſe, ſeeing the Record is here certified with an *Alias prout patet*, *Term. Michaelis*, ſo that it appears the Action was commenced before the Original, it cannot be intended the Original in this Action, but in ſome other by *Twyſden*; whereto the Court agreed, and reverſed the Judgment.

Littleboy againſt *Wright.*

Words ſpoken within the Palace Juriſdiction, loſs of Marriage without the Juriſdiction.

CASE (was brought) for ſaying of the Plaintiff within the Juriſdiction of the Palace-Court, *She is a hackney Whore*, whereby ſhe loſt her Marriage: And after Verdict and Judgment for the Plaintiff in the Palace-Court, Error was brought here, and the Judgment

ment reverſed, becauſe it is not ſhewn, That the loſs of Marriage was within the Juriſdiction of the Court, and that is the Cauſe of the Action, and not the ſpeaking of the Words only; and if the Action be brought within two Years after the loſs of the Marriage, the Statute of Limitations is not pleadable, tho' the Words were ſpoken ten Years before, if the Words are not actionable, without the loſs of Marriage.

3. C. Raym. 63.
1 Sid. 85, 95, 105.
1 Keb. 328.
Statute of Limitations.
Ante 50.
V. 1 Saund. 78, 74.
Poſt. 96, 104, 105, 137, 208.
1 Sid. 180, 151.
1 Vent 2 72.
2 Show. Caſe 430.

Term.

Term. Sanct. Mich.

ANNO

14 Car. II. in Banco Regis.

Oliver againſt *Evens.*

A. promiſes *B.* to deliver him a Deed; *B.* promiſes *A.* on the delivery to pay him 60*l.* *A.* ought to averr Performance of the Delivery. S. C. 1 Keb. 333. 342.

ASSUMPSIT, and declares, whereas the Plaintiff had purchaſed a Leaſe of certain Lands, then in the Defendant's Poſſeſſion; the Defendant in Conſideration that the Plaintiff had promiſed to the Defendant to pay him 60*l.* the firſt of *February* 1661, the Defendant promiſed the Plaintiff to deliver to him the ſaid Leaſe on the Payment of the 60*l.* and alſo to deliver to him the Poſſeſſion of the Land the firſt of *April* next following; and aſſigned a Breach, That he did not deliver the Poſſeſſion of the Land the ſaid firſt of *April*. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment by *Aleyn*, That tho' here is a Promiſe againſt a Promiſe, yet the Leaſe being to be delivered on Payment of the Money, the Plaintiff ought to aver that he had paid the 60*l.* for otherwiſe he is not to have the Leaſe delivered to him: To which the Court agreed; but they held, That the Delivery of the Poſſeſſion of the Land is another Thing and diſtinct, and to be done at another Time; and therein is the Breach alledged, and that ought to be done be the 60*l.* paid or not; but if the Breach had been for not delivering of the Leaſe, it had been as *Aleyn* ſaid. But the Breach being for not delivering the Poſſeſſion of the Land, they gave Judgment for the Plaintiff.

A Promiſe to pay 60*l.* on the delivery of a Deed, and alſo to deliver Poſſeſſion, are diſtinct.

Bunton

* *Bunton* againſt *Bateman.* * P. 71

CASE for diſturbance of a Seat in an Ayſle of the Church, and preſcribes, That he and all the Tenants of ſuch a Houſe, had all the Seats in the ſaid Ayſle; and after Verdict it was moved in Arreſt of Judgment, That he had not ſhewn any Cauſe or Conſideration for the Preſcription, as to repair, *&c.* And it was moved ſeveral Times, and much debated, and divers Caſes were cited on the one Side and the other as *Hob.* 69. *Buckly* & *Bailie*'s Caſe, 2 *Cro.* 366. *Francis* v. *Lee*, *ibid.* 605. *Davis* & *Dee.* And on the other Side were cited *Co.* 3 *Inſt.* 202. *Corven* againſt *Pym*, 1 *Inſt.* 121, 122. 12 *Co. Rep. Corvin* & *Powis*'s Caſe there reported; and 2 *Inſt.* 489. And ſome would make a Difference between a Seat in a Church and an Ayſle, for an Ayſle may be on his own Soil: And after many Debates it was at length adjudged for the Plaintiff, on this Difference, *viz.* it is good in an Action of the Caſe againſt a Diſturber, but not in a Prohibition, as many of the Caſes before cited are; alſo, in Caſe where one claims a Right againſt the Ordinary, he ought to ſhew a Title by repairing, *&c.* but not in Caſe againſt a Treſpaſſor or Tort-feaſor; and thereupon Judgment was given for the Plaintiff, whereupon a Writ of Error was brought in the Exchequer Chamber, and the Judgment affirmed there in *Eaſter* Term, 16 *Car.* 2.

Caſe for diſturbing a Seat in the Church, without a Preſcription to repair.
S. C. 1 Sid. 88, 201.
1 Keb. 345, 370, 386, 420, 433, 457.
1 Wils. 326.
1 Term. Rep. 428.

Scot againſt *Stephenſon.*

ASSUMPSIT, That whereas *Sanders* was indebted to divers Perſons and the Plaintiff obliged for him, and forced to pay them; the Defendant being *Sanders*'s Executor, in Conſideration the Plaintiff would forbear to ſue him for the Money, promiſed to pay him: After a Verdict for the Plaintiff on the Iſſue *Non Aſſumpſit*, it was moved in Arreſt of Judgment, That here was no Conſideration; for it does not appear that *Sanders* had promiſed or was obliged to ſave him harmleſs; and *Borden*

Aſſumpſit where one was obliged for the Defendant's Teſtator, and forced to pay the Money.
S. C. 1 Sid. 71.
1 Keb. 346.
Vide Poſt, 257, 273.
2 Lev. 119, *&c.*
Yelv. 134.

* P. 72 *Borden* and *Thyn*'s Caſe in *Yelverton* 40. * and *Smith* and *John*'s Caſe, *Owen* 132. were cited. But by the Court, There was Equity, that *Saunders* ſhould ſave the Plaintiff harmleſs, and a Suit in Equity is a Suit, or perhaps he might be charged by (a Writ) *De plegiis acquietandis*, and therefore they held the Conſideration good, and gave Judgment for the Plaintiff, except Cauſe (ſhewn to the contrary) on *Monday* next, *&c.*

Winn againſt *Lloid.*

Entry (alone) no Plea in a Writ of Error, but Entry and Feoffment, and Entry and Leaſe is. S. C. 1 Keb. 54. 351, 388, 459 717, 748, 809, 914 Raym. 16, 55, 70, 96, 134. 1 Sid. 213. Poſt, 130, 146.

ERROR of a Common Recovery in *Wales*, and a *Scire Facias* againſt the Demandant in the Recovery; but then it being ſhewn that others were Tertenants, a *Scire Facias* iſſued againſt them alſo, and the Sheriff returned *J. S.* and *J. D.* Tertenants. *J. S.* came and pleaded an Entry by the Plaintiff in the Error, into Part pending the Writ. *J. D.* pleads, That he is Leſſee for Years to one *Owen*, and demands Judgment if he ſhall be compelled to anſwer without the ſaid *Owen*: The Plaintiff demurs to both; and as to the firſt it was reſolved by the whole Court, That Entry by the Plaintiff in the Error is no Plea, for he might have a Writ of Error before any Poſſeſſion recovered againſt him, when he is poſſeſſed of the whole for reverſing the Judgment, although he cannot have Reſtitution of that which he had never loſt. But an Entry and Feoffment is an Extinguiſhment of the Writ of Error, for that he hath (thereby) departed from his Title, and an Entry and Leaſe is a Suſpenſion of the Writ of Error for the Time; and as to the ſecond (Plea) it was ſaid, *Firſt*, That to ſay he is only Leſſee for Years, where the Sheriff has returned him Tertenant, is contrary to the Record: It was alſo ſaid, That the Tertenant cannot plead in Abatement of the Writ of Error, but only in Bar, as a Releaſe, *&c.* in maintenance of his Title; for the *Scire Facias* againſt him is not to hear the Errors, but only to hear the Proceſs and Record; and thereto *Twyſden* and *Wyndham* inclined. And afterwards it being moved again, and the Matter appearing to be for delay, the Pleas were both over-ruled, and a *Reſpondeas ouſter* awarded.

Wheatly

* *Wheatly* againſt *Thomas.* * P. 73

EJECTMENT by *Francis Brook*, Leſſor of a third Part of Lands in *Cooling*, and on Not guilty tried at the Bar, a Special Verdict found *George Brook*, Lord *Cobham*, ſeized of the Manor of *Cooling*, had Iſſue *William*, *Duke*, *Charles*, *Caliſthenes*, and *John*, and three other Sons, and deviſed the Manor to *William* for Life, Remainder to the firſt and all other Sons of *William*, and the Heirs males of the Bodies of every of the Sons of *William*; with like Eſtates for Life to each of the other ſeven Sons of the Lord *Cobham*, and the Heirs males of their Bodies; the Remainder to the Heirs of the Body of *William*; with like Remainders to ſix of the younger Sons of the Lord *Cobham* in Tail; the Remainder to the right Heirs of *Edward*, the eighth Son of the Lord *Cobham*: *William* the eldeſt Son had Iſſue *Henry* and *George*, both which were attainted of Treaſon, 1 *Jac.* 1. and afterwards by Act of Parliament, 3 *Jac.* 1. reciting their Treaſon, it is enacted, *That all their Eſtates, Rights*, &c. *ſhall be forfeited and veſted in the King, ſaving the Rights of others*; Provided and be it enacted, *That the Manor of* Cooling *ſhall be and remain to* Duke Brook, *and the Heirs male of his Body*, the Remainder to *Charles* in like manner, Remainder to Sir *William Brook*, (who was Father of the now Plaintiff) the Son of *George* in like manner; Remainder to *Caliſthenes*, Son of the Lord *Brook* in like manner; Remainder to Sir *John Brook*, another Son of the Lord *Cobham* in like manner; *and for default of ſuch Iſſue, to and for ſuch other Perſons and Eſtates as are limited by the Will of the Lord* Cobham. And afterwards in the ſeventh Year of King *James* I. by another Act of Parliament it was enacted, *That Sir* William Brook, *Son of* George, *who was attainted*, and Father of the Leſſor, *ſhould be reſtored in Blood to be Heir to any Anceſtor lineal or collateral, as if* George *had never been attainted*: And it is further found, That *Duke*, *Charles*, *Caliſthenes*, and all the other Sons of the Lord *Brook* are dead without Iſſue male; and *Henry* without Iſſue, and that *William* the Son of *George*, had Iſſue only three Daughters, one of which is Leſſor of the Plaintiff, who entered into

An Act of Parliament, That the Heirs of one attainted ſhall inherit. S C Raym. 53. 1 Keb. 349, 395, 436, 549, &c.

into the third Part, and deviſed it to the Plaintiff, as appears, *&c.* and (conclude) if for the Plaintiff, for
*P. 74 the * Plaintiff; and if not for the Defendant: And it was argued this Term by Serjeant *Baldwin* for the Plaintiff, and *Jones* for the Defendant; and *Mich.* 15 *Car.* 2. by Serjeant *Glyn* for the Plaintiff, and *Finch* the King's Solicitor for the Defendant. And the only Queſtion was, Whether thoſe Daughters, the Iſſue male being ſpent, ſhould inherit as Heirs of the Body of *William*, the Son of the Lord *Cobham*, notwithſtanding the Attainder, either by Virtue of the Proviſo of the Statute 3 *Jac.* or if not by that only, if by that and the Statute 7 *Jac.*? And for the Defendant it was argued, That the Statute 7 *Jac.* ſignified nothing in the Caſe, and that they could not take by the Proviſo in 3 *Jac.* for if they ſhould take the Eſtate thereby, they ought to take as Purchaſers, and that they could not do, not being Heirs, for by the Attainder the Blood was corrupt, and they cannot be Heirs to any Perſon: And although by 7 *Jacobi*, the Blood of their Father was reſtored, it came too late, for he was not Heir at the Time of the Act, 3 *Jac.* when the Grant by the Proviſo of 3 *Jac.* was made; and that in the End of the Proviſo, it is only for Default of the Iſſue male of *Duke*, *Charles* and *William*, and the others there named, that it ſhall remain, and be to ſuch Perſons, and for ſuch Eſtates as is limited by the Will of the Lord *Cobham*; and by the Will it is limited to the Heirs of the Body of the Lord *Cobham*; and this neither *William* nor his Heirs could not be at the Time of the making of the Act of 3 *Jac.* and the Act of 7 *Jac.* comes too late to make them Heirs by relation to the Time of 2 *Jac.* To which it was anſwered, and afterwards in *Trinity* Term, 16 *Car.* 2. adjudged by the Chief Juſtice, and *Twyſden* and *Wyndham*, That by Virtue of the Stat. 3 *Jac.* without the Aid of 7 *Jac.* they ſhould have the Land: And the Act enacting, That it ſhould go according to the Will of the Lord *Cobham*, is all one as if the Will had been recited, and had been expreſly ſo as in the Words of the Will, 9 *Co.* Abbot of *Strata Marcella*'s Caſe, a Grant *per tot tanta talia*, *&c.* as good as if all the Particulars had been expreſſed; and when the Statute ſays, That the Lands ſhall be and remain as is limited by the Will of the Lord *Brook*, and that it is to the

the Heirs of the Body of *William*, when the Parliament intended to grant, they intended the Grantee ſhould take, and therefore if they are not Heirs, it has made them Heirs as to this Purpoſe; as where a Lord grants to his Villein, he thereby enables the Villein to take it. * And 10 *H.* 7. 13. The King by his Grant may enable his Subject to take; and ſo by the Intent of the Act it appears what Perſons ſhall have the Land, and then by the ſame Intent they are made Heirs; And they ſaid, That the Act of 3 *Jac.* had ſo qualified the Attainder, as to the Manor of *Cooling*, ſo that as to it, it is as if no Attainder had been; and an Act of Parliament may capacitate a Man to have an Heir, or to be an Heir, that otherwiſe could not have or be an Heir. And they held, That by this Act, the Perſons themſelves attainted, if in Life, might have and enjoy the Manor of *Cooling*: And *Wyndham* ſaid, with whom the Chief Juſtice agreed, that if a Manor be given by Act of Parliament to the Heirs of *J. S.* who is attainted, this ſhall enable his Son to take it. But *Kelynge* at this Time puiſne Juſtice held, That the Statute of 3 *Jac.* worked by way of Reviver of the old Eſtates where there are Perſons capable, and not as a Grant of new (Eſtates) and that the Blood being corrupt at the time of the Act of 3 *Jac.* none could take as Heir at that Time, and therefore the Plaintiff could not recover: But he and all the reſt agreed, that the Statute of 7 *Jac.* ſignified nothing in the Caſe; but all that is done, is by the *Proviſo* in the Statute 3 *Jac.* And the Ch. Juſtice, and *Twyſden* and *Wyndham* agreeing that that was ſufficient, gave Judgment for the Plaintiff.

* P. 75

Hurſt's Caſe.

A *MANDAMUS* was prayed to reſtore him to an Attorney's Place in the Court of *Canterbury*; but it was denied, becauſe it is but a private Employment; and a *Mandamus* lies only for Offices concerning the Public: But they agreed it had been granted for a Schoolmaſter, and for a Church-warden, and for a Pariſh-Clerk, becauſe they are public Offices: But it was ſaid at the Bar, That it had been granted for an Attorney, for he is an Officer concerning the public Juſtice, and is compellable

Mandamus for an Attorney. S. C. 1 Sid. 94, 151. Raym. 56, 94. 1 Keb. 349, 354, 387, &c. Vide Mandamus to reſtore. Poſt. 119, 123, 148, 162, 306. 1 Vent. 331. N. Lutw. 322.

2 Salk. 430, 431, 436, 437.

ble to be Attorney for any Man, and has a Freehold in his Place. Whereupon the Court gave Day to produce ſuch a Precedent, and at the Day a Precedent was produced in 1651, for reſtoring an Attorney of the Borough Court of *Southwark*; but that being in the late troubleſome Times, the Court did not regard it: But afterwards in *Trin.* 15 *Car.* 2. he had a *Mandamus* in

* P. 76

* this ſame Caſe. And in the ſame Term another *Mandamus* was granted to reſtore an Attorney of the Court of the Liberty of *St. Martin's le Grand, London.*

Molins againſt *Werby.*

Error in Fact and in Law is double, but muſt be ſpecially demurred to.
S. C. 1 Sid. 94. 1 Keb. 355, 388.

ERROR of a Judgment in the Palace-Court, held before *James* Duke of *Ormond*; and the Error aſſigned was, That the Duke was not in Court, (the Court being held before one *Wynne* his Deputy, according to the Grant.) Second Error, That the Judgment was given for the Plaintiff, where it ought to have been for the Defendant. Whereupon the Defendant demurred; and now for the Plaintiff it was ſaid, That the Aſſignment of the Error is double, the firſt being Error in Fact, the ſecond Error in Law; and Error in Fact and in Law cannot be aſſigned on one Writ: But as to to the firſt, it was ſaid, That it is not aſſignable, being contrary to the Record. And as to the ſecond, it was ſaid, That he ought to have demurred for the Doubleneſs, otherwiſe he ſhall not have Advantage thereof on a general Demurrer: To both which the Court agreed; and it being moved again, the Court held the ſame Opinion in both the ſaid Points; And then it was touched, That a judicial Place to hold a Court by Deputy cannot be, and ſo held *Foſter*, Chief Juſtice, and *Twyſden*. But *Wyndham* held otherwiſe, and ſaid, That many Recorders are made to hold Court, *&c.* by themſelves or Deputies; and ſo ſaid *Wylde* at the Bar, and that he ſo held his Place of Recorder of *London* at that Time. *Foſter* ſaid, That is by the Cuſtom of *London:* But ſurely many other Recorders hold their Courts by Deputies; ſo does the Recorder of *Northampton*, which is the Earl of *Mancheſter*, and

Error that the Judge was not in Court, is againſt the Record, and not aſſignable.
Poſt, 310, 311. 1 Burr. 166. Stra. 8, 25. 70, 684. 5 Com. Dig. 301. Wils. 85.

A Judicial Office performed by Deputy.

and holds the Courts by his Deputy *Harvy* at this Time. And the Steward of the Borough-Court of *Southwark* holds it by Deputy.

* *Vernon* againſt *Aſſop.* * P. 77

DEBT on an Obligation, conditioned to pay 7*l.* by 2*s.* a Week till the 7*l.* were paid, and if he failed of the Payment of the 2*s.* at any of the Days wherein it ought to be paid, the Obligation to be void, or elſe to remain in full Force. The Defendant pleads, That he did not pay 2*s.* on one of the Days wherein it ought to be paid. The Plaintiff demurs, and it was argued by *Pawlet*, That whereas by the firſt Part of the Condition he is to pay 7*l.* by 2*s.* a Week; the latter Part, that if he does not pay the 2*s.* at any of the Days, is repugnant and void, for it appears plainly by the former Part, That the Intent was to have the Money paid; and cited 3 *Cro.* 780. Alſo by his Plea he hath confeſſed that the Money ought to be paid, when he ſays, that he did not pay on one of the Days wherein it ought to have been paid. *Wyndham*, Juſtice, held, That either all the Condition is void for Repugnancy, and then the Obligation is ſingle and without a Condition, or elſe the firſt Part of the Condition is good, and the latter Part is void for the Repugnancy. But it was adjourned: And afterwards the ſame Term it being moved again, the Court held, That the Condition ſhould be taken diſtributively, by referring Particulars to Particulars, *viz.* That if he paid the 7*l* the Obligation ſhould be void; but if he failed of paying the 2*s.* at any of the Days, it ſhould be in full force; to which the reſt agreed; for the Obligation ſhall not be of no Effect, if by any Means it may be made good.

Obligation conditioned to pay, &c. and if he fail to be void.
S. C. 1 Sid. 105.
Ravm. 27, 68.
1 Kel. 356. 415. 451. 725.
2 Danv. 2.
Vide ant. 3. V. 1 Sid. 105, 308, 456.
1 Kel. 451.
2 Keb. 622.
2 Mod. 285.
1 Mod. 35.
1 Saund. 65, 66.
2 Saund. 78, 79.
Vide 1 Roll. Abr. 419. b.
2 Danv. 7. pl. 8.
1 Wood's Conv. 312.
Poſt. 85, 86.
2 Show. 15.
2 Danv. 23.
2 Show. 16.

Baſſett againſt *Lewis.*

ERROR of a Judgment in a *Quare Impedit*, in *Wales*, where the Plaintiff being Nonſuit, the Defendant made Title to have a Writ to the Biſhop, *viz.* That the Dean and Chapter of St. *D.* were ſeized, and pre.ented

A Leaſe to commence after the End of another, where there was no ſuch Leaſe.

S. C. 1 Keb. 360. Vide poſt, 234. 1 Saund. 183.

preſented *J. S.* and granted the Advowſon for Years to *Richard Williams*, from the Time that the Advowſon then granted ſhould determine; and it was aſſigned for Error, That it was not known when the Advowſon granted did determine, and therefore the Advowſon granted to *Williams* for Years, was void for the Incertainty * when it ſhould commence. Whereto it was anſwered by *Aleyn*, That then the Grant to *Williams* ſhall commence immediately at the Time of the Grant: To which the Court agreed, and affirmed the Judgment.

* P. 78

Note, The Plaintiff in the *Quare Impedit*, had averred, That there was not any Grant *in eſſe* at the Time of the Grant to *Williams*; But the Court held the Grant to be good without the Aid thereof.

Anonymus.

Adminiſtration of Goods in divers Peculiars, belongs to the Metropolitan. V. 1 Sid. 90. Hard. 216. 2 Leon. 155. Cro. El. 457.

IT was held by *Twyſden* and *Wyndham*, Juſtices, That where a Man dies Inteſtate, having Lands in divers Peculiars, that the granting of the Adminiſtration does not belong to the Ordinary of the Dioceſs, but to the Metropolitan of the Province, for they are excepted from the Ordinary's Juriſdiction.

1 Rol. Ab. 908, 909. 2 Lev. 86. Gilb. on Wills 423.

Petler againſt *Yaleman.*

Bounds of Vills triable by the Eccleſiaſtical Courts, but not of Pariſhes. 1 Sid. 89. 1 Keb. 369. V. 2 Lev. 103, 143. 4 Mod. 157, 158. 1 Mod. 251. 2 Mod. 237.

A PROHIBITION was prayed for that the Bounds of two Vills, *viz.* *D.* and *S.* in the Pariſh of *Abingdon*, were in Queſtion, *viz.* the one claimed the Tithes in Queſtion, as lying in the Vill of *D.* and the other claimed them as lying in the Vill of *S.* within the ſame Pariſh: But the Prohibition was denied by the whole Court; for tho' the Bounds of a Pariſh are not triable in the Eccleſiaſtical Court, yet the Bounds of Vills in the ſame Pariſh are triable there.

Coniers

Coniers againſt *Smithe.*

ERROR of Judgment in an Action of Covenant in *Durham*, where the Action was brought on a Leaſe for twenty-one Years, and the Leſſee covenanted to pay 20*l.* yearly by equal Portions at *Michaelmas* and *Lady-Day*, and aſſigned a Breach, That he did not pay the Rent due at the aforeſaid ſeveral Feaſts during the *Term aforeſaid, and Judgment was by Deſault, and a Writ of Inquiry of Damages; and then Judgment *Quod recuperet*, and the Error aſſigned by *Aleyn* was, That the Breach was not well aſſigned, but he ought to have aſſigned the Breach particularly; for which Cauſe (he ſaid) it was erroneous: But after ſeveral Debates the Judgment was affirmed in *Hillary* Term following, and adjudged that the Breach was well aſſigned, for perhaps it was never paid at any of the Days.

Breach aſſigned, That the Leſſee did not pay the Rent due at the ſaid ſeveral Feaſts during the Term.

* P. 79

Wiſeman againſt *Cotton.*

ON a Trial at Bar in a feigned Iſſue, directed out of Chancery: The Queſtion was, If the Lands in Queſtion having been Gavelkind, and diſgavelled by Act of Parliament in the Time of *Edward* the Sixth are that notwithſtanding deviſable? And the Caſe was found Specially, That *Roper* being ſeized of the Lands in Queſtion, which were then Gavelkind and departible, it was on his Petition enacted by Parliament, That his Lands ſhould be diſgavelled to all Intents and Purpoſes, and deſcendible as Lands at Common Law, to the eldeſt Son only: And it was objected, That the Cuſtom to deviſe, is a Cuſtom of Gavelkind, and that by diſgavelling the Land, the Cuſtom of Deviſing is as well taken away as the Cuſtom of Partibility; for it is a Cuſtom incident to Gavelkind; and cited the Statute of the Cuſtoms of *Kent*, 13 *E.* and 4 *E.* 1. *Com' Banco, Rot.* 2. *Fitz. Aid*, 129, 144. *Raſt. Entries Dower Demand* 6. 2 *E.* 4. 19. 5 *E.* 4. 8. *Mich.* 16 *Jac. Com. Banco Rot.* 3063. *Mich.* 21 *Car.* 1. *Rot.* 497. *F. N. B.* 198. &c. And that all their Cuſtoms, to deviſe, to have

Lands diſgavelled by Act of Parliament, yet the Cuſtom to deviſe remains. S. C. Raym. 59, 76. 1 Sid. 77. 135. 1 Keb 288, 372. 492, 505. Hard. 325. 2 Danv. 441. Vide 1 S d. 138. Style 476. Co. Litt. 175. 2 Sid. 154. Raym. 58, 59. Hard. 325.

Dower, to loſe Dower, to be Tenant by the Curteſy, *&c.* are included in the Cuſtom of Gavelkind; ſo that by the pleading of Gavelkind, it is ſufficient without pleading of any ſuch particular Cuſtoms, to deviſe, to have Dower, *&c.* Alſo by the Words of the Act, the Lands are not only *to be diſgavelled*, but to be ſo *to all Intents and Purpoſes*, by which Words all the particular Cuſtoms are taken away, if they had not been ſo by the general Words before. But after two ſeveral Arguments at the Bar, it was afterwards in *Eaſter* Term, 15 *Car.* 2. adjudged, That * by this Act of diſgavelling, the Cuſtom of Deviſing was not taken away; for by *Foſter*, *Twyſden* and *Mallett*, it is a mere collateral Cuſtom, and no part of the Cuſtom of Gavelkind; and it is not enough in Pleading, to ſay that the Lands are Gavelkind, without pleading the Cuſtom to deviſe, which proves it a meer collateral Cuſtom to Gavelkind; and although the Words of the Act are, *That it ſhall be diſgavelled to all Intents and Purpoſes*, yet the Words ſubſequent are, *and ſhall deſcend as Lands at Common Law*, which reſtrains the foregoing general Words by this particular concluſion, according to 8 *Co.* 154. *b.* To which *Wyndham* alſo agreed, but he held it to be a Cuſtom of Gavelkind. But they all agreed, That the Act being made upon *Roper*'s Petition, and it being a Privilege at Common Law to deviſe Lands, it could not be ſuppoſed that he petitioned to deſtroy a Privilege of deviſing which he had by the Cuſtom of *Kent*, but only to take away the partibility of the Eſtate, whereby many Families by a Diviſion of their Eſtates, were reduced to a more inferior Degree: And all agreed, That the Cuſtom to deviſe, remained notwithſtanding the Act for diſgavelling, and gave Judgment accordingly.

* P. 80

Gavelkind. Vide 1 Sid. 77, 138. 2 Sid. 154. Cro. Car. 562. Raym. 59 77. 2 Danv. 442. Hard. 325.

Darkin againſt *Done.*

Error aſſigned that the Plaintiff died before Judgment. S. C. 1 Sid. 93, 181. 143. 1 Keb. 368, 372, 416.

ERROR of a Judgment in Ejectment, That the Plaintiff was dead before the Judgment given. Plea by Attorney, That he was living at the Time of the Judgment, and Iſſue thereon and Verdict found that he was dead. It was objected by *Aleyn*, That the Judgment ought not to be reverſed, but a *Scire Facias* (to go) againſt the Executors of the Plaintiff; for now it appears,

pears, That the Attorney who pleaded that he was living, did it without Authority; for he could not be Attorney to a dead Man. But a Caſe was cited in *Raſtal's Entries*, Tit. *Brief*, *Diviſion Mort*, where ſuch Pleading is as here. And ſaid by the Court, That it was not known to the Court when the Plea was pleaded but that the Party was alive, and therefore the Court could not deny to receive the Plea; and now though it appears by the Verdict, that he who pleaded it could not be Attorney, yet by the * ſame Verdict it appears alſo that the Plaintiff was dead, and therefore by the Opinion of *Mallett*, *Twyſden* and *Wyndham*, the Judgment was reverſed, *Foſter* Chief Juſtice, being of a contrary Opinion, becauſe though it appears by the Verdict that the Plaintiff was dead, yet it does not legally ſo appear, the Verdict itſelf not being legally obtained,

* P. 81.

Mole againſt *Wallis*, or *Bold* againſt *Warren*.

COVENANT on an Indenture of Apprenticeſhip to ſerve him ſeven Years which he had not done, but departed: The Defendant pleads Infancy, the Plaintiff replies the Cuſtom of *London*, for Infants to bind themſelves Apprentices; the Defendant demurs; And whether this was a Departure? was the Queſtion. And *Wyndham* and *Foſter* Chief Juſtice at one Time ſeemed that it was not, it being laid in *London*, where the Cuſtom is known; and *Foſter* cited a Caſe, where Infancy being pleaded to a Feoffment, the Plaintiff replied the Cuſtom of Gavelkind in *Kent*, That an Infant might make a Feoffment at fifteen, and the Action being laid in *Kent*, it was reſolved to be good: *Twyſden* and *Mallett* on the contrary ſaid, That which is pleaded generally as the Common Law, cannot be maintained by a Cuſtom, but is a Departure, and cited *Yel.* 14. *Plowd. Com.* 105. *Mich.* 6 *H.* 7. *pl.* 4. *Hill.* 21 *H.* 7. *pl.* 29. 2 *Cro.* 494. *Hutt.* 63, 64. But they agreed, That if one pleads a Statute, and the other ſays that it is repealed, the other may ſay that it is revived by another Statute; or if a Man pleads a Statute, and the other ſays that it was to continue but till ſuch a Time, which is expired, the other may ſay, That the firſt Statute was

Matter pleaded as at Common Law, cannot be maintained by a Cuſtom. S. C. Raym 60. Vide ant 14. 1 Keb. 376, 469. 51. & *vide* 1 Sid. 142. Vid. Co. Litt. 334. 21 H. 7. 25, b. Nelſon's Lutw. 460. 5 Com. Dig. 103.

Departure. Poſt, 85.

But one Statute may be maintained by another,

after-

afterwards made perpetual, becauſe it is only a fortifying of the firſt Matter. And in *Hillary* Term following, the Party (Plaintiff) prayed Leave to diſcontinue.

* P. 82

* *Crawford* againſt *Middleton.*

Words, one told me that he carried ſuch a one to Gaol for Felony, where no Body told him ſo. S. C. 1 Keb. 344, 353, 377. 1 Com. Dig. 182, 187. 4 Bac. Abr. 509.

CASE for that the Defendant carrying one *Woodford* to *Lincoln* Gaol for Felony, when he came to *Lincoln*, falſely and maliciouſly ſaid of the Plaintiff, That he met one upon the Road, who ſaid to him, *What, are you carrying* Woodford *to Gaol? I ſhall follow you ſhortly, and bring with me* Henegage Crawford (*the Plaintiff*) *for ſtealing a Mare.* After Verdict for the Plaintiff on Iſſue Not guilty, it was moved in Arreſt of Judgment. *Firſt*, That the Words are not actionable, not being any direct Affirmative that the Plaintiff had ſtole a Mare; and cited *Hob.* 177. *Steward* againſt *Biſhop*, *He is in* Warwick *Gaol for ſtealing of a Mare*; adjudged not actionable for that Reaſon. But to this it was anſwered, That it was adjudged 1 *Cro.* 195. 2 *Cro.* 154, 247, 736. contrary to that in *Hobart.* And ſo held all the Court here (except *Mallett*) That the Words are actionable: And the Court now queſtioned, whether the Caſe in *Hobart* were Law or not? Then it was moved, that it is not ſaid in the Declaration, That in Truth no Body met him upon the Road, and ſo ſpoke to him; whereto it was anſwered by *Aleyn*, and agreed by *Twyſden*, That it being laid to be falſly and maliciouſly, and ſo found; it is a Proof that no Body ſaid ſo to him. But *Foſter*, *Wyndham* and *Mallett* were againſt this, and held the Declaration ill for want of the Averment, that in Truth no Body ſaid ſo to him; For that had been traverſable, and the Defendant might have pleaded thereto that another ſo told him; and ſo put the Plaintiff to bring the Action againſt ſuch other; and they gave a Rule, That the Plaintiff ſhould take nothing by his Bill. In this Caſe *Twyſden* mentioned a Caſe tried before *Hobart*, which he himſelf heard; where the Plaintiff brought an Action againſt one, for falſly and maliciouſly ſaying of him, *That he heard he was hanged for ſtealing of an Horſe*; and on the Evidence it appeared, that the Words were ſpoken in Grief and Sorrow for

Words laid to be ſpoken maliciouſly, when ſpoken for Grief.

for the News; and *Hobart* cauſed the Plaintiff to be non-ſuit, for it was not maliciouſly; which all the Court here agreed to be done according to Law.

* *Nicholas* againſt *Pullin.* Vide infra. * P. 83

COVENANT, and declares, That the Defendant leaſed to him ſuch Lands, and covenanted to ſave him harmleſs againſt all Suits, Evictions or Expulſions. The Defendant pleads, That *J. S.* outed him by an *Habere facias poſſeſſionem.* The Plaintiff demurs, and the Plea was ruled by the Court to be ill for two Cauſes; *1ſt.* For that he pleads an Expulſion by an Execution, without ſhewing any Judgment. He ought to have ſaid, That *J. S.* brought an Ejectment whereupon were ſuch Proceedings, and that it was adjudged he ſhould recover, and thereupon iſſued the *Habere facias poſſeſſionem, &c.* *2dly.* He ought to have ſhewn that *J. S.* had a legal Title before the Leaſe on which he brought his Action, for the Covenant only extends to Expulſions upon an elder Right: And perhaps in this Caſe *J. S.* might recover by virtue of a Leaſe made to him by the Plaintiff himſelf.

One pleads an Execution without a Judgment. S. C. 1 Keb. 379, 380, 413. A Plaintiff evicted without ſhewing Title. 3 Bac. Abr. 715. 5 Com. Dig. 44, 83. Term. Rep. C. B. 275. 1 Term. Rep. 671. Vide poſt, 301, 312.

Pullin againſt *Nicholas.* Vide ſupra.

DEBT on an Obligation to perform Covenants in an Indenture of Leaſe made by the Plaintiff to the Defendant, whereby the Defendant covenanted that he would not deliver the Poſſeſſion to any but the Leſſor, or to ſuch Perſons as ſhould lawfully evict him. The Defendant pleads, That he did not deliver the Poſſeſſion to any but ſuch as lawfully evicted him. Whereupon the Plaintiff demurs; and it was objected, That the Plea was ill, and a Negative pregnant; that he ought to have ſaid, that ſuch a one lawfully evicted him, to whom he delivered the Poſſeſſion, or that he did not deliver the Poſſeſſion to any: But for the Defendant it was ſaid, That the Plaintiff had not aſſigned any Breach, and therefore could have no Judgment; for it was ſaid by them, That he ought to have replied and aſſigned a Breach;

A Negative pregnant, when good, &c. 1 Com. Dig. 832. Stra. 925.

Breach; whereto it was ſaid for the Plaintiff, That he * having pleaded an ill Plea, had neceſſitated the Plaintiff to put himſelf in Judgment of the Court upon the Plea; and cited *Yelv.* 78, 152, 153. And *Wyndham* held the Plea ill, for it was in the Conuſance of the Defendant, whether he had delivered the Poſſeſſion to any or not, and for what Cauſes, and therefore he ought to ſhew it. *Twyſden* on the contrary (ſaid), The Plea was purſuant to the Words of the Covenant, and therefore ſufficient; and that the Plaintiff ought to have replied, that he had delivered it to ſuch a one and ſhewn a Breach. And afterwards in *Michaelmas* Term following, it was argued again; and then for the Plaintiff was cited 2 *Cro.* 559, 560. That the Plea was not good. But now all the Court held the Plea purſuing the Words of the Covenant, good, being in the Negative; and that the Plaintiff ought to have replied and aſſigned a Breach; which not having done, he could not have Judgment, and therefore they gave Judgment againſt him.

* P. 84

Plea ill, the Plaintiff demurs without aſſigning any Breach.

The *King* againſt *Gilliſer*.

IT was moved by *Aleyn* to quaſh an Order of the Juſtices of Peace of the County of *Derby*, for compelling a Man againſt his Will to take an Apprentice on the Stat. 43 *El. c.* 2. Firſt, For the Order does not ſay it was a poor Child. 2*dly*, It is not ſhewn what Trade the Defendant uſed, Husbandman or what. 3*dly*, For the Matter, the Juſtices had not Power to compel a Man to take whom they would to be Apprentice, for ſo they might impoſe upon me my mortal Enemy; and of this Opinion, he ſaid, were *Brampton* and *Rolle* in their Times, and ſo was *Twyſden* now. But *Foſter*, *Mallett* and *Wyndham* on the contrary ſaid, Injuſtice was not to be ſuppoſed in the Juſtices, and as the Statute obliged the Juſtices to put our Children Apprentices, ſo it obliged the Maſters to receive them; and they confirmed the Order, and directed an Information on which they would deliver their Opinions more at large, when it appeared what the Defendant had to ſay for his Excuſe.

Where one is compellable to take an Apprentice. Raym. 65, 67. Blackborn's Caſes 18, 19. Vide 6 Mod. 164. 2 Stra. 1266. 1 Salk. 66. 2 Salk. 491.

Houſe

* *Houſe* againſt *Launder.*

* P. 85

DEBT on Obligation to ſtand to an Award: The Defendant pleads no Award: The Plaintiff replies, and ſhews an Award and a Breach. The Defendant rejoins, That a new Cauſe of Action aroſe after the Submiſſion, and before the Award, and they awarded mutual Releaſes to be made at the Time of the Award made, and nothing further is awarded on one Side but the Releaſe, and ſo the Award was void; on which the Plaintiff demurred, and it was adjudged for him, for the Rejoinder is a Departure; for when he pleads no Award, it ſhall be intended no Award at all; and then to ſhew and confeſs an Award in Fact, but (ſaying) that it is void in Law is a Departure; and they cited *Rugles* againſt *Witherly*, *Trin.* 15 *Car.* 2. *B. R. Rot.* 604. as ſo adjudged, and the like between *Dean* and *Iſham*, the following Term adjudged.

Plea of no Award, Rejoinder, a void Award, is a Departure. S. C. 1 Keb. 414. V. 2 Saund. 34. 189. N. Lutw. 117, 146. Ante 81.

Similar caſe adjudged Hill. 16 & 17 C. 2. B. R. inter *Morgan* & *Mor.* Poſt. 127. 138.

Lawſon againſt *Widdrington.*

DEBT on Obligation to pay 50*l.* the 10th of *January* next enſuing on three Months warning: The Defendant pleads the Action lay not, becauſe the Defendant did not give three Months warning before the 10th of *January* next enſuing the ſealing of the Obligation. The Plaintiff demurs; for the Money being to be paid on a certain Day on three Months warning, the Defendant is to give the warning to be ready to receive it. 2*dly*, If the Plaintiff is to give the Warning, the Plea cannot be but in Abatement, becauſe the Action is brought before the Money is due and not in Bar, (for) ſo the Money would be loſt; and then a Plea in Abatement commencing or concluding in Bar is ill; and cited *Bro. Brief* 77. 36 *H.* 6. 3 *Cro.* 102. The Court at this time thought the Warning ought to be given by the Plaintiff, for otherwiſe, if the Defendant would never give Warning, the Money ſhould never be paid; and it was adjourned. But afterwards it being moved again, the Court held, That it ſhall be taken that the Obligor

Condition to pay 50*l.* the 10th of *January* next enſuing on three Months warning. S. C. 1 Keb. 380, 415. Raym. 61. Lutw. 124. 2 Danv. 68. Pl. 8. V. Stil. 241. 9 H. 7, 17, 20. 2 Show. pl. 8. 6 Mod. 227, 260, 261. Poſt. 312.

*P. 86 is to pay the * Money on the 10th of *January* next enſuing, giving the Plaintiff three Months warning thereof; for the Words ſhall be taken the moſt ſtrongly againſt the Obligor; and they ruled Judgment for the Plaintiff, unleſs Cauſe were ſhewn before the End of the Term.

Bentley againſt *Hore.*

Sufficiency of the Bail taken by the Sheriff is not traverſable. S. C. 1 Sid. 96. Vide Poſt. 209. 254. 1 Sid. 384 838. 1 Vent. 237. 2 Lev. 103. 1 Saund. 161, 162, 316.

CASE for an Eſcape on meſne Proceſs: The Defendant pleads, That he let the Priſoner go on ſufficient Bail. The Plaintiff demurred, and it was argued, That the Plea was not good, becauſe he had laid no Venue where he took the Bail, and the Sufficiency of the Bail is traverſable. But by the Court, the Sufficiency of the Bail taken by the Sheriff is not traverſable, for the Bail is only for Security of the Sheriff to ſave him againſt Amerciaments: For by the Stat. 23 *H.* 6. he is obliged to let the Party to Bail by ſufficient Mainpernors; and the Statute was made for the Eaſe of the Subject that he ſhould be let to Bail, which Sheriffs had refuſed to do before the Statute: But then the Statute provides for the Security of the Sheriff, that he ſhould take reaſonable Sureties, and yet if he takes one Surety only, it has been adjudged ſufficient. And *Twyſden* ſaid, That it was held by *Rolle* and *Glyn*, when they were Chief Juſtices here, that the Statute 23 *H.* 6. was a general Law, of which the King's Courts ought to take Notice without Pleading of it.

Stat. 23 H. 6. a general Law.

Ruſſel againſt *Lee.*

A ſingle Bill by an Infant for Neceſſaries, is good. S. C. 1 Keb. 382, 416, 423. 2 Danv. 768. c. Vide 1 Roll. 729. pl. 3, 5, 6, and 7. Cro. Jac. 494. Poſt. 169.

DEBT on a ſingle Bill: The Defendant pleads that the Bill was made by him when within Age: The Plaintiff replies, That it was for Victuals, and neceſſary Clothes delivered to him, and ſuitable to his Quality. The Defendant demurs, and now it was argued for him, That the Bill was void as well as an Obligation; but that a Contract or Promiſe for Neceſſaries was good. 2*dly*, It is not averred that they were delivered to him to his own Uſe, 2 *Cro. Ives* againſt *Cheſter*, where this Exception

ception is allowed good. But on the other Side it was argued, That his ſingle Bill for Neceſſaries is good; but not an Obligation with a Penalty; and they cited *Co. Lit.* 172. *a* and 3 *Cro.* 920. and ſo held the Court; and to the 2d Exception, * it was ſaid, That in *Popham*'s Report of the Caſe of *Ives* and *Cheſter* it was diſallowed; and ſo held the Court here, *viz.* That the Exception was not good, for when the Things are delivered to him, and ſuitable to his Quality, it cannot be intended but that they were for his own Uſe, and gave Judgment for the Plaintiff *Niſi.*

Stra. 168, 699, 1083, 1101. 3 Com. Dig. 165. 3 Burr. 1717, 1794. * P. 87 2 Bl. Rep. 1325. 3 Bac. Abr. 134. 547. 695. 1 Term Rep. 41. Moor. 679. Cro. El. 910, 920. Co. Lit. 172.

Anonymus,

ACTION was brought on the Statute 5 *Eliz.* for uſing the Trade of a Barber; *Twyſden* at firſt doubted whether it were a Trade within the Statute. But at length all agreed that it is.

Barber a Trade within 5 *Eliz.* S. C. 1 Keb. 329. 411. 422. Vide 2 Lev. 206.

Fitz-Harris againſt *Bonun.*

ERROR of a Judgment in the Palace Court in *Aſſumpſit*, where to prove the Conſideration an Arreſt was to be proved by the Plaintiff; and for that he did not produce the Writ, the Defendant demurred on the Evidence; and thereupon Judgment was given for the Plaintiff; and now to reverſe the Judgment it was ſaid for the Plaintiff in Error, That the King's Writs are Matters of Record, and are not to be proved but by themſelves; and it was agreed by the Court that the Writ ought to have been produced in Evidence, but by the Demurrer it is confeſſed, the Arreſt being Matter of Fact, though it be to be proved by a Matter of Record, and the Jury might of their own Knowledge know that there was a Writ, *Dyer* 239. *Plowd. Com. Scholaſtica*'s Caſe. And by the Demurrer on the Evidence, all Matters of Fact are confeſſed that the Jury could know of their own Conuſance; and the Judgment was affirmed.

Demurrer on the Evidence cannot be for a Thing which the Jury may know of their own Conuſance. S. C. 1 Sid. 103, 105. 1 Keb. 450. See 1 Sid. 283. Palm. 456. 2 Danv. 174. Co. Litt. 27. 5 Co. 104. Bull. N. P. 313.

Anonymus.

Anonymus.

On a Promiſe againſt a Promiſe there needs no Averment.
S. C. 1 Keb. 333, 344.
1 Sid. 270.
Vide ante 3, 20, 70, 87.
* P. 88
Poſt, 293.
1 Danv. 41. pl. 11.
2 Lev. 23.
2 Show. 329.
Vide 1 Sid. 270, Cro. Jac. 116. Hetl. 88, 89. Burr. 277, 278. 8 Bac. Abr. 35.

ASSUMPSIT, where the Plaintiff had agreed to take the Son of the Defendant Apprentice; the Defendant promiſed to give a Bond to pay to the Plaintiff 40*l.* and the Plaintiff ſays, that he had accepted the Son into his Service as Apprentice; and the Defendant had not given Bond to pay the 40*l.* After Verdict for the Plaintiff on Iſſue *Non Aſſumpſit*, it was moved in Arreſt of Judgment, * That it is not ſaid that the Son was bound Apprentice, but (only) that he had received him into his Service as Apprentice, and this he might do and turn him out of doors the next Day; but it was not allowed, for the Agreement to take him Apprentice, is a Promiſe whereon the Defendant might have his Action; and ſo it is a Promiſe againſt a Promiſe, and needs no Averment. *Secondly*, (urged) That it is not alledged of what Sum the Obligation ſhould be: This was alſo diſallowed, for a Contract or Covenant to give Bond for the Payment of Money, is to be intended of double the Sum; but an Award to give a Bond, without mentioning the Sum for the Payment of 20*l.* is not good; for the Arbitrators are to make an End of all.

Elliott againſt *Blake*.

Covenant with a *Proviſo*, the Plaintiff need not ſhew more than the Covenant.
S. C. Raym. 65.
3 Keb. 424, 426.

COVENANT and declares, That the Defendant covenanted to deliver to him 1500 Meaſures of Salt-Petre before ſuch a Day, and that he had not done it; the Defendant demands *Oyer* of the Deed, wherein the Covenant was as before ſaid; *Provided*, That if any Miſchance happen by Fire or Water to diſable him, that he ſhould be excuſed; and pleads that he was diſabled by Accident of Fire; Iſſue thereupon, and Verdict for the Plaintiff: And it was moved in Arreſt of Judgment, That there was a Variance between the Deed on which he declared, and that produced in Court; for the one is abſolute and the other conditional. But Judgment was given for the Plaintiff, for he need not declare on more of the Deed than the Covenant, and it is on the Defendant's Part to ſhew the Proviſo, which goes by way of Defeaſance of the Covenants.

Term.

Term. Sanct. Hill.

ANNO

14 & 15 Car. II. in Banco Regis.

Neal againſt *Deucton.*

Conuzance of Pleas. 8. C. 1 Sid. 103. Vide Mo. 249. 276. Lane 81, 87. 1 Sid. 283. Palm. 456. Hard. 05, 509. N. Benl. 233. 1 Mod. 164. 2 Danv. 166. pl. 7, & 174.

ACTION brought here for Words ſpoken at *Wiſbich* in the Iſle of *Ely*; the Defendant impanels, and afterwards *Turner* for the Biſhop of *Ely*, came and demanded Conuſance of the Plea, and produced the Biſhop's Charter, whereby he had Conuſance of Pleas granted to him, and a Letter of Attorney to make the Demand: But *Twyſden* Juſtice ſaid, Conuzance was not grantable after Imparlance: To which *Turner* replied, The Party himſelf cannot plead to the Juriſdiction after Imparlance, becauſe by the Imparlance he had admitted the Juriſdiction, but the Biſhop who is a Stranger might demand it at any Time; and he cited 40 *E.* 3. 1. *a.* 11 *H.* 4. 4. *b.* 43. *b. Mich.* 6 *H.* 7. *pl.* 6. *Mich.* 9 *H.* 7. *pl.* 6. *Trin.* 6 *H.* 7. *pl.* 17. And to this Opinion Juſtice *Wyndham* inclined, but it was adjourned: (This Caſe was between *Neal* and *Deucton.*) And *Note*, In *Eaſter* Term, 18 *Car.* 2 *B. R.* Conuſance was demanded in another Caſe; and then it was held by the Court, That the Warrant of Attorney for demanding the Conuzance, ought to be filed in Court. And former Allowances of the Conuzance were ſhewn, and there were cited 1 *H.* 7. *Rot.* 107. *Raſt. Ent.* 128. *Hill.* 21 *E.* 3. *Rot.* 21. *Raſt. Ent.* 130. 35 *H.* 6. 54. It ſeems the Conu-

Conuzance is demandable by the Lord of the Franchiſe, but not pleadable to the Juriſdiction by the Party.

* P. 90

* The *King* againſt *Larking*, and *others*.

Forcible Entry into a Church. S. C. 1 Sid. 101. 1 Keb. 438. Hawk. P. C. 280.

IT was moved to quaſh an Indictment of a Forcible Entry into a Pariſh-Church, and in the Parſonage-Houſe, becauſe there is another Remedy by a Writ *De vi laica removenda*; and the Statute does not extend thereto, this Indictment being on the Statute of H. 6. But he agreed it to be within the Statute of *R.* 2. But it was held by the Court to be within both Statutes, and that it well lay: And the Party took nothing by his Motion.

Booth againſt *Leach*.

Words *Traiterly Rogue*. S. C. 1 Sid. 102. 1 Keb. 469.

ERROR of a Judgment in the Common Pleas in Caſe for theſe Words, *Thou art a traitorly Rogue*; where the Words were adjudged not actionable, becauſe adverbially ſpoken, as *thieviſh Rogue*, becauſe it ſignified no more than an Inclination to *Thieving*. But by *Aleyn*, *Bankruptly Knave* has been adjudged actionable; and by the Court the Words ſeem actionable, as 3 *Cro. Ward* againſt *Thorn*, *Traiterous Knave* are adjudged actionable.

Oldham againſt *Hamſted*.

A Bailiff pleads Property in Replevin. S. C. 1 Keb. 360, 441.

IN Replevin, one as Bailiff made Conuſance, and pleaded Property in a Stranger; and upon Demurrer it was objected that he could not; and cited 1 *Inſt.* 145. *b.* 11 *H.* 4. 4. But held by the Court, That is intended of the County-Court, and not of this Court; and cited 2 *H.* 6. 14. and gave Judgment for the Conuſant.

The

* The *King* againſt *Thurſton*.

* P. 91

INDICTMENT of Murder, and on a Special Verdict found at the Aſſizes at *Bury*, the Caſe was, in *Hillary* Term 1659, a *Latitat* iſſued to arreſt him returnable in *Eaſter* Term 1660, on which the 29th of *May* he was arreſted by a Warrant thereupon, and upon that Arreſt the Bailiff was killed; and afterwards an Act is made for the Confirmation of all judicial Proceedings, which related to the firſt Day of the Parliament, *viz.* 15 *April*, 1660, and the ſole Queſtion was, If by the Relation of the Act, which made the Proceedings legal, and the Arreſt good (which elſe had been void and without Authority) this killing be Murder. And it was argued at the Bar, by *Kelynge* for the King, and by *Jones* for the Defendant: And *Kelynge* ſaid, That by relation all the Proceſs is made good, for it ſhall relate to the firſt Day of the Parliament; *Jones* agreed the Act ſhould relate to the firſt Day of the Parliament, but not to ſuch Intent as to make it Murther *ex poſt facto*, which was not ſo when the Fact was done. The Court ſaid nothing. But afterwards in *Eaſter* Term 16 *Car.* 2. I heard *Thurſton* plead his Pardon of this Murder, whereby it ſeems as if the Opinion of the Court was againſt him.

One arreſted by an illegal Warrant, kills the Bailiff, and by Act of Parliament made afterward, the Warrant is made good by relation to the firſt Day of the Parliament. 1 S. C. 1 Keb. 454. 456.

Townſend's Caſe.

A *MANDAMUS* was prayed for him to the Mayor, &c. of *Oxford*, to admit him to be a Freeman of that City, having ſerved ſeven Years Apprentice; and on View of a Precedent in the like Caſe of *Norwich*, it was granted: And thereupon it was returned, that he put himſelf Apprentice for ſeven Years according to the Cuſtom, and that he covenanted to ſerve ſeven Years, and not to marry within the Time; and that within the firſt two Years he married, and ſo broke his Covenant, and that his Maſter accepted of him to ſerve for the Reſidue of the Time, which he did, but not as an Apprentice, but rather as a Journeyman. And it was objected, That by this Breach of Covenant he had loſt his Right

A *Mandamus* to make an Apprentice free of a Town. S. C. 1 Sid. 107. 1 Keb. 458, 470, 659. Vide ante 23, 65, 75.

1 Salk. 67.

Right of Freedom: But the Court held the contrary, for that an Action of Covenant might lie, but not loſs of his Freedom, and awarded a peremptory *Mandamus* to admit him to his Freedom, in *Hillary* Term, 15 & 16 *Car.* 2.

* P. 92

* *Glaſcock* againſt *Morgan.*

Debt on a Judgment after *Elegit*, and Part levied of the Goods. S. C. 1 Sid. 184. 1 Keb. 692.

DEBT on a Judgment of 1000*l.* The Defendant pleads, That the Plaintiff had ſued three ſeveral *Elegits* on the ſaid Judgment into ſeveral Counties, on one of which the Sheriff return'd, That he had levied of the Defendant's Goods 500*l.* whereon the Plaintiff demurs. This Caſe was argued three ſeveral Times at the Bar, *viz.* in this Term and *Eaſter* Term following; and in *Eaſter* Term 16 *Car.* 2. by *Aleyn*, *Baldwyn* and *Winnington* for the Plaintiff, and by *Jones* and *Wylde*, and by *Jones* again for the Defendant: And firſt it was queſtioned, if the ſuing of the *Elegit* be not an Election of that Writ, and a Waiver of all others? 2*dly*, If the ſuing of the *Elegit* be not an Election to have ſuch an Execution, and no other? 3*dly*, If the ſuing of three Writs, and it not appearing what is become of the other two, be not a bar of this Action; for Lands may have been delivered on the other Writs? And many Books and Authorities were cited on the one Side and the other, and the Court was a long Time in variety of Opinion: But at length agreed, that Judgment ſhould be given for the Plaintiff; for when the Statute of *Weſtminſter* 2. gave the *Elegit*, it ſaid, *To hold the Tenements aforeſaid until the Debt ſhall be levied*; ſo that it intended to give a Remedy for the Debt until it was levied, and to give a further Remedy than was at Common Law, and not to take away any Remedy which was at Common Law before; and (the Court) ſaid, That the Judgment lies at Common Law, and at Common Law, Debt will lie on the Judgment after the Action when no Execution lies. And it was not the Intent of the Statute by a nice Conſtruction of the Word *Elegit*, to ſay that it was ſuch an Election of the Writ, ſo as that he ſhould never after have any other Writ, when it appears the Statute intended to add a larger Remedy to Men than they had before. And the levying of Goods for

for Parcel only upon the *Elegit*, is no impediment, but that he ſhall have another *Elegit*, and take the Lands for the Reſidue. But when an *Elegit* is ſued, and Lands are taken, and that returned and filed, he ſhall not have any further Execution. And as to that, that it does not appear what is become of the other Writs of *Elegit*, it ſhall not be intended * that any Lands are extended thereupon, it not being ſhewn; and if there were any Lands extended, the Defendant ought to have ſhewn it in Pleading. And in *Eaſter* Term 16 *Car.* 2. Judgment was given for the Plaintiff by the whole Court. Whereupon the Defendant brought a Writ of Error immediately, as I was informed, but what became thereof I never heard.

* P. 93

Otes againſt *Thornhill.*

DEBT on an Obligation conditioned to make for the Plaintiff all the Linen he ſhall wear during his Life, and aſſigned a Breach, That he deſired the Defendant to make ſuch Linen for his neceſſary wearing, which ſhe had not done. The Defendant demurs, and the Reaſon was that the Plaintiff did not deliver to the Defendant the Cloth of which it was to be made. To which it was anſwered for the Plaintiff, That the Defendant being to make the Linen, is alſo to find the Cloth, as if one be obliged to cover the Lord's Hall, he is alſo to find the Materials, 11 *H.* 4. 25. 16 *H.* 7. 9. 11. But by the Court, the Contracts of Parties are to be interpreted according to their Intent and the ſubject Matter. As if a Tailor be obliged or promiſe to make a Suit of Cloaths for me, I ought to deliver him the Cloth, for that it is uſual, and not for him to provide it. But if a Shoemaker be obliged to make a pair of Shoes for me, he is alſo to find the Leather, becauſe it is uſual. Alſo if a Sempſtreſs be obliged to make for me a Suit of Linen, ſhe is to find the Linen-Cloth; but it is not here ſhewn, that the Defendant was a Sempſtreſs, nor ſuch a Perſon as uſes to make Linen and find the Cloth: And therefore Judgment was given for the Defendant.

Obligation to make a ſuit of Linen for one. Q. Who ſhall provide the Cloth? S. C. 1 Keb. 466. Q. 2 Jon. 2 Danv. 99. Pl. 5 & 6. Vide 2 Danv. 100. Pl. 6, 7.

Upham's Caſe.

Procedendo after Record filed in in *B. R.* S. C. 1 Sid. 108. 1 Keb. 470. Vide ante 67.

AN Indictment of Barretry being brought into this Court and filed; it was moved to have a *Procedendo*. Mr. Juſtice *Twyſden* ſaid, It could not be, for a Record filed here cannot be removed without an Act of Parliament: But by the Opinion of *Foſter* and *Wyndham*, a *Procedendo* was granted. *Quære* of this.

* P. 94

* *French* againſt *Pierce*.

Obligation not to waſte: Replication, that he had waſted divers Goods, is well, but otherwiſe in Covenant. S. C. 1 Keb. 467, 471.

DEBT on an Obligation to ſatisfy for all Goods that an Apprentice ſhall waſte, and in the Replication aſſigns a Breach, that he had waſted divers Goods to the Value of 100*l.* Whereupon the Defendant demurs, and it was now excepted as to the Replication, that it was too general, not ſhewing what the Goods were. But by the Court, it is well enough in this Action on the Obligation, where Damages are not to be recovered, but the Penalty of the Obligation upon any breach (thereof;) otherwiſe in Covenant, where the Recompence is to be by Damages: And Judgment was given for the Plaintiff.

Note, This whole Term I was ſick, and the Caſes which I have before reported of this Term, are (taken) from the Report of my Friend Mr. *Lemuel Sholdam*.

Termino

Termino Paſchæ,

ANNO

15 Car. II. in Banco Regis.

Turner againſt *Felgate.*

THIS Caſe was cited and remembered by *Twyſden* and *Wyndham* Juſtices, to have been adjudged within ſix or ſeven Years laſt paſt: A Man had a Judgment and Execution executed, and afterwards the Judgment was vacated for being unduly obtained, and Reſtitution awarded; and afterwards the Defendant brought Treſpaſs againſt the Plaintiff in the firſt Action, for the taking of the Goods; and it was adjudged that it well lay againſt the Party; for by the vacating of the Judgment it is as if it never had been; and is not like a Judgment reverſed by Error: And *Note*, This Action was againſt the Party, and not againſt the Sheriff, who had the King's Writ to warrant him, which is ſufficient for him; for in Treſpaſs or Falſe Impriſonment, it is enough for the Sheriff to plead the Writ only, but the Party ought to plead not only the Writ, but alſo the Judgment. But Juſtice *Twyſden* ſaid, That he was not ſatisfied with this Judgment when it was given, in the Time of *Glyn* Chief Juſtice, nor was he yet for making a Man a Treſpaſſor by Relation, for when the Execution was ſerved there was a Judgment, though that afterwards the Execution was vacated. But *Note*, The Difference between charging of an Officer and charging of the Party; for in *Bayly* and *Bunning*'s Caſe hereafter, it is held, That the Officer ſhall not be charged, where perhaps the Party will be charged.

A Judgment vacated, yet the Officer is excuſed for executing the Writ, but not the Party. 8. C. Raym. 73. 1 Sid. 107. 2 Sid. 125. 1 Keb. 453, 478, 488, 822. Bulk. N. P. 84.

Vide poſt, 173, 174.

* P. 96

* *Weſtcote* againſt *Harding.*

Citation out of a Dioceſs, for Tithes within the Dioceſs. S. C. 1 Keb. 481, 501. Vide 1 Keb. 638, 647, 651, 669.

A PROHIBITION was granted to the Biſhop of *Sarum*, for citing one out of his Dioceſs to appear at his Court at *Sarum*; whereas the Party was living in *London:* But it being a Suit for Tithes of Lands in the Dioceſs of *Sarum*, the Court on Notice thereof granted a Conſultation, for the Lands lying in the Dioceſs of *Sarum*, the Suit cannot be elſewhere, let the Defendant live where he will; and therefore this Caſe is not within the Statute; and a Conſultation was granted.

Whitehead againſt *Brown.*

A Promiſe within a Juriſdiction, to pay for a Thing that does not appear to be done within the Juriſdiction. S. C. Raym. 75. 1 Keb. 522. Vide ante 50, 69. poſt, 208, 104, 137, 153, 156. 2 Lev. 87. 1 Saund. 73, 74. 1 Sid. 331. 1 Vent. 28, 72, 243. 2 Show. Caſe 430.

ERROR of a Judgment in the Palace-Court, where the Plaintiff declared, That whereas the Defendant being indebted to him for the Nurſing of a Child, afterwards ſuch a Day at ſuch a Place within the Juriſdiction of the Court, he did promiſe to pay. After Verdict and Judgment the Error was aſſigned, That it does not appear where the Nurſing was, nor where he was indebted: And therefore *Twyſden* held the Judgment ought to be reverſed, for the Jury is to inquire of the Nurſing, and of the being indebted; *Foſter* and *Wyndham* on the contrary held, That it does not appear that thoſe were out of the Juriſdiction; and where a Man is indebted to another in one Place, he is indebted to him in all Places where he comes; and when he promiſes within the Juriſdiction, he was (became) indebted within the Juriſdiction, and it was adjourned. But afterwards at another Day, *Foſter* was of *Twyſden*'s Opinion, for that the Jury is to inquire of the Conſideration, as well as of the Promiſe, otherwiſe it is a naked or void Agreement. But it was further adjourned.

Fanſhaw

* *Fanſhaw* againſt *Mildmay.* * P. 97

DEBT on the Statute of *Edw.* 6. for Tithes, and on *Nil debet* Verdict was for the Plaintiff: It was moved in Arreſt of Judgment, that the Declaration is, That the Defendant was Occupier of twenty Acres of Land, which before-ſaid thirty Acres he ſowed, and carried the Corn from off the ſame without ſetting out the Tithes; ſo that (it appears) they are not the ſame Acres that he ſowed: But by the Court: There not being any thirty Acres before, the Word *thirty* is void; and it ſhall be taken *the before-ſaid Acres*, which were well enough aſcertained before, and good; and gave Judgment for the Plaintiff.

Debt for Tithes of 20 Acres, and that he carried the Corn from the ſaid 30 Acres. S. C. 1 Sid. 135. 1 Keb. 492.

Roe againſt *Hawkes.*

ACTION on the Caſe by an Officer of the Cuſtom-houſe at *Portſmouth*, for that the Defendant ſaid of him, *He ſet his Hand to the Petition to bring the King to Juſtice.* After Verdict for the Plaintiff it was moved for the Defendant for a new Trial, for the Exceſſiveneſs of the Damages, which were 700*l.* and cited *Wood* and *Gunſton*'s Caſe in *Style*'s *Reports.* But thereto it was anſwered by *Twyſden* Juſtice, That the New Trial was not granted in *Wood* and *Gunſton*'s Caſe meerly for the Exceſſiveneſs of the Damages, but becauſe a Tampering with the Jury was proved. *Secondly*, it was moved, That the Attorney for the Plaintiff ſaid before the Trial, that the Jury were their Friends, and underſtood their Buſineſs, and that they would do well enough. But by *Wyndham* Juſtice, If expreſs Embracery of the Jury be not proved, the Words of the Attorney ſhall not work any Prejudice to the Cauſe of his Client; and if the Damages are exceſſive an Attaint lies, and a new Trial was denied.

A new Trial not granted for the Exceſſiveneſs of Damages, nor for Words ſpoken by the Attorney. S. C. 1 Sid. 131. Vide Hard. 203, 221, 222, &c. Vide 1 Keb. 49, 133. & poſt, 119. Style 462, 466. 2 Salk. 647, 649.

Benſon

* P. 98 * *Benſon* againſt *French.*

Promiſe to the Bailiff on the Plaintiff's part, that if he would permit the Priſoner to tarry out of Priſon to pay the Debt. S. C. T. Jo. 139. 1 Sid. 132. 1 Keb. 483. 1 Danv. 45. 22. Vide 2 Lev. 17. 1 Mod. 166. Raym. 153. 1 Sid. 283. 2 Sid. 123. Poſt, 188.

ASSUMPSIT and declares, That he had arreſted a Woman for 20*l.* and that ſhe being in the Cuſtody of the Bailiff at the Defendant's Houſe, the Defendant in Conſideration that the Bailiff would permit the Woman to tarry at the Defendant's Houſe for one Night, promiſed to the Bailiff on the Plaintiff's Part, to deliver the Woman to the Bailiff the next Morning, or to pay the 20*l.* And that the Bailiff permitted the Woman to tarry there that Night; but that the Defendant did not deliver her to the Bailiff the next Morning, nor had he paid the 20*l.* After Verdict on *Non Aſſumpſit* for the Plaintiff, it was moved in Arreſt of Judgment by *Wylde* the King's Serjeant, That the Woman was either always in the Cuſtody of the Bailiff, (and then it was not any Conſideration) or out of his Cuſtody, and then it was an Eſcape, and the Conſideration and Promiſe were (then) both illegal. To which it was anſwered by *Jones*, That it might be for the Eaſe of the Woman to lie there that Night, and ſo a good Conſideration, though never out of the Cuſtody of the Bailiff; and if it be intended that ſhe was out of the Bailiff's Cuſtody, yet it ſhall be intended that it was by the Plaintiff's Aſſent, becauſe the Promiſe was made to the Bailiff on the Plaintiff's Part; and the Plaintiff having brought the Action it proves his Aſſent, and his Aſſent after is ſufficient to make the Promiſe good. And held by the Court, If it was an Eſcape, the Conſideration and Promiſe were both illegal; but they held that it was not any Eſcape, but rather an Undertaking that ſhe ſhould not eſcape: And the Promiſe being laid to be made to the Bailiff on the Plaintiff's Part, it ſhall be intended that ſhe was left there by the Aſſent of the Plaintiff. And they gave Judgment for the Plaintiff, except better Cauſe were ſhewn.

* P. 99 * *Mayhew* againſt *Flower.*

Trover *de Salſura, Anglice a ſalting Tub*, and Damages given

TROVER was brought among other Things *de una Salſura, Anglice a ſalting Tub.* And after Verdict for the Plaintiff on Not Guilty, it was moved in

in Arreſt of Judgment, That *Salſura* is Latin for *Seaſoning* and not for a *Salting Tub*, and then Damages given for that, is ill. The Court ſaid, Then the *Anglice* is void, and no Damages given for it. But the Record being inſpected, it was found, That Damages were given particularly for the (ſeveral) Things in particular, and among the reſt *pro ſalſura præd.* and yet were alſo given for all the Particulars together. And that *Salſura* was altogether uncertain, which is to be intended a *Seaſoning*: And they held it incurable, and ſtayed the Judgment.

for that particularly is ill. S. C. 1 Keb. 420, 428, 488. 1 Sid. 98. 2 Danv. 460. Pl. 11. Vide 2 Sid. 174, 175. 1 Sid. 183, 445. Poſt, 129. Raym. 15. 3 Lev. 336. Stra. 738, 810, 827.

Gwynne againſt *Gwynne.*

ERROR of a Judgment in a *Quod ei Deforceat* in *Weles*, by Proteſtation to proſecute in Nature of a Writ of Right, obtained there thirty Years before, becauſe the Judgment being for the Demandant, was *Quod teneat Tenementa præd'*, where it ought to have been, *That he ſhould recover Seiſin*, &c. And after divers Arguments in this and the following Term, the Judgment was reverſed.

Judgment in a real Action that the Demandant ſhould hold the Tenements, &c. S. C. 1 Sid. 138, 1 Keb. 495, 543, 557, 696.

Henn againſt *Hanſon.*

COVENANT brought on a Covenant in a Leaſe for Years to pay the Rent reſerved. The Defendant pleads a Releaſe by the Plaintiff of all Demands at a Day before the Rent in Queſtion became due. The Plaintiff replies, That the Releaſe was in Performance of an Award of all Matters in Controverſy between the Plaintiff and the Defendant: Whereupon the Defendant demurs, and it was argued for the Defendant, That the Releaſe is a Bar; for a Releaſe of all Demands will releaſe a Rent-Service, and extinguiſh the Inheritance thereof, *Co. Lit.* 310. 2 *Cro.* 486. & 170, 171. this very Caſe is put, that ſuch Releaſe ſhall releaſe a Rent on a Leaſe for Years before that * it be due, becauſe it releaſes the Contract. See *Hancock* againſt *Field's* Caſe, *Moor* 544, 545. 6 *H.* 7. 15. 14 *H.* 8. 6. And of this

A Releaſe of all Demands does not releaſe Rent on a Leaſe for Years not due. S. C. 1 Sid. 141. 1 Keb. 491, 519. Vide Poſt, 191, 272. 2 Lev. 210, 214. 3 Lev. 273. 2 Show. 90.

* P. 100

this Opinion was *Twyſden*, Juſtice, That the Releaſe in this Caſe was a Bar, for the Rent is a Thing in demand tho' not yet due, and the Releaſe diſcharges the Means to come by it, and cited 40 *E.* 3. 47. 20 *Aſſ.* 5. And altho' this Releaſe was made in purſuance of an Award, and ſo not within the Intent of the Arbitrators, becauſe this Rent was not then in Controverſy; yet (ſays he) the Intent ought to be ruled by the Law, and not the Law by the Intent. But for the Plaintiff it was argued, That this Releaſe ought not to be a Bar; *1ſt.* For that it was out of the Intent both of the Arbitrators and the Parties, the Award being made of other Matters, and this Rent not then due nor in Controverſy, and cited 2 *Cro.* 300. *Tinan* againſt *Bridges*, a Releaſe of all Demands after the Award made, does not releaſe a Sum awarded to be paid at a Day ſubſequent to the Releaſe: Alſo they cited 2 *Cro.* 486. *Witton* againſt *Bye*, where it is held by *Houghton*, That a Releaſe of all Demands, does not releaſe a Rent incident to the Reverſion; but there, for that the Leſſee had aſſigned his Term rendering Rent, for that this Rent was a Sum in groſs, and not incident to the Reverſion, it was barred by the Releaſe of all Demands, and there 170. *Hancock* againſt *Field*'s Caſe, adjudged by the whole Court, That where the Leſſor on payment of 60*l.* to him by the Leſſee due on a Judgment, releaſed to him all Demands; this did not releaſe a Covenant for repairs not then broken, but a Releaſe of all Covenants would have releaſed the Covenant. And of this Opinion were *Wyndham*, *Mallet*, and *Foſter*, That the Releaſe here did not bar, as well for that it was not the Intent of the Parties, as for that this Rent being incident to the Reverſion, and part thereof, is no more releaſed hereby than the Reverſion itſelf is. But a Rent-Service in groſs, as a Seigniory of which *Littleton* is to be intended, would have been releaſed by ſuch a Releaſe, for that the Seigniory is thereby extinct; alſo this Rent becomes due by the Perception of the Profits, and is not like to a Rent-charge; or a Rent, Parcel of a Seigniory. And they gave Judgment for the Plaintiff: And of the like Opinion was the Court, in *Michaelmas* Term, 29 *Car.* 2. between *Ingram* and *Bray*, which is entered *Hill.* 2 *Rot.* 49. which ſee hereafter. And ſo in *Trinity* 21 *Car.* 2. *B. R.* between *Stokes* and *Stokes*, which alſo ſee hereafter, where by

by a * Releaſe of all Demands on his proper Account, it was adjudged by the whole Court, That an Obligation taken by the Plaintiff in his own Name in Truſt for the Children of *J. S.* was not diſcharged thereby. And in *Eaſter* Term 1 *W. & M. B. R.* between *Knight* Executor of *Knight*, and *Cole* Executor of *Lawford*, where *Knight* had a Judgment of 6000*l.* againſt *Lawford*, and *Lawford* had given a Legacy of 5*l.* to *Knight*, and on the Receipt thereof *Knight* gave to *Cole*, the Executor of *Lawford*, a Releaſe in this Form; *I acknowledge to have received of* Cole 5*l.* *left me as a Legacy by* Lawford, *and do releaſe to him all Demands which I againſt him, as Executor of* Lawford, *can have for any Matter whatſoever.* And it was adjudged by the whole Court, That the generality of the Words *all Demands* ſhould be reſtrained by the particular Occaſion mentioned in the former Part thereof, *viz.* the Receipt of the 5*l.* Legacy, and ſhould not be a Diſcharge of the Judgment.

* P. 101

A Releaſe of all Demands reſtrained to the particular Occaſion thereof.

Vide ante 99. Poſt, 272.

2 Lev. 201, 214, 215.

3 Lev. 273, 274.

2 Show. 90.

Brown againſt *Spence.*

ON a Trial at Bar in a *Quare Impedit*, the Plaintiff proved, That he read the Articles on the fifth of *November*, where his Induction was *September* the fifth, and it was ruled inſufficient, becauſe not within two Months after the Induction, computing twenty-eight Days to the Month. But then he proved, That he read them in the Porch of a Chapel of Eaſe within the ſame Pariſh within a Month after his Induction, the Keys of the Church and of the Chapel being detained from him by the Defendant; and this was admitted by the Court to be a ſufficient Reading of the Articles within the Statute of 13 *Eliz.*

Reading the Articles in the Porch of a Chapel of Eaſe, well enough, where he is kept out of the Church and Chapel.

S. C. 1 Sid. 163.

1 Keb. 502, 590.

Peaſelie's Caſe.

IN Ejectment tried at the Bar where the Plaintiff made Title as Adminiſtratrix, and proved her Adminiſtration by the Act of the Court for the Grant of it to her; and this was admitted ſufficient (Evidence) by the whole Court, without ſhewing any Grant thereof under the Seal of the Court.

Adminiſtration proved by the Act of the Court without Seal.

S. C. 1 Keb. 509.

Elkins

* P. 102

* *Ekins* against *Tresham.*

Case for falsly affirming a Messuage to be let at 42*l. per Annum*, where it was let only at 32*l. per Ann* S. C. 1 Sid. 146. 1 Keb. 518, 522.

CASE, That whereas the Plaintiff and Defendant were in Treaty for the Sale of a Messuage; the Defendant falsly and fraudulently affirmed it was let at 42*l. per Annum*; whereto the Plaintiff gave Faith, gave him 500*l.* for it, where in Truth it was let at 32*l. per Annum* only. After Verdict for the Plaintiff, it was moved in Arrest of Judgment, That the Action did not lie; as for saying that a Thing is of a greater Value than it is, without Warranty no Action lies, *Yelv.* 20. No more will it for saying that it is demised for more than in Truth it is; for the Party might inform himself from the Tenant, and a Warranty will not bind a Man in a Thing that is apparent; as to warrant that a Horse has both his Eyes, when he is apparently blind of one of them. But by the Court, tho' an Action will not lie for saying, That a Thing is of greater Value than it is (nor by *Wyndham*, it is Perjury to swear it, because Value consists in Judgment and Estimation, wherein Men many Times differ) Yet to affirm that a Thing is demised for more than it is, is a Falsity in his own Knowledge, and the Party who is deceived, may for such Deceit have an Action, for perhaps the Lease is by Parol, or the Tenant will not inform the Purchaser what Rent he gave. And after it had been twice moved, Judgment was given for the Plaintiff in *Trinity*, 15 *Car.* 2. by the whole Court.

Hookes against *Swain.*

Covenant to pay 20*l.* annually, and does not say how long, if it shall be for life. S. C. 1 Sid. 151. 1 Keb. 511, 517, 555. 2 Danv. 58. pl. 6. Vide 2 Mod. 267. Bull. N. P. p. 162.

COVENANT was brought on a Covenant, whereby the Defendant covenanted if the Plaintiff married his Daughter to pay him 20*l. per Annum*, without mentioning for how long, and assigned a Breach in Non Payment for two Years: The Defendant as to the first Year pleads payment, and as to the other demurs, supposing that no Time being limited, he was not obliged to pay more than one Year. But on Argument, the Court inclined, That the Payment should be for Life, for *annually* imports more than for one Year; but whether

ther for the Life of the Huſband or the Wife, * it was not determined; And adjourned: But it ſeemed by ſome to be for the Life of the Huſband, becauſe it is in lieu of a Portion, and it ſhall be taken moſt ſtrongly againſt the Covenantor; others held that it ſhould be for the Life of the Wife, becauſe it is for the Marriage Proviſion for her. * P. 103

Note, In *Trinity* 3 *Jac.* but entered *Paſch.* 3 *Jac.* 2. in the Common Pleas, between *Death* and *Benns*, A Widow Woman covenanted on Marriage with her Huſband, that he ſhould enjoy the Wife's Lands during their joint Lives; and the Huſband covenanted with the Wife's Truſtees, to pay them 20*l.* annually, not ſaying how long, and it was adjudged to be for their two Lives, as the Covenant on the other Part was for the Enjoyment of the Wife's Lands.

Foſter againſt *Holyman.*

A Promiſe that if they agreed on a Price, to pay it. S. C. 1 Keb. 512, 624.

ERROR of a Judgment in the Palace-Court, where the Plaintiff declares, That he and *Higden* were bargaining for a Horſe, and the Defendant aſſumed (undertook) That if they agreed on the Price, the Defendant would pay the Money; and that they agreed for ſo much, and the Defendant had not paid. And Verdict and Judgment for the Plaintiff there on the Iſſue *Non Aſſumpſit*; and the Error aſſigned was, That there was not any Conſideration, for it is not that he ſhould ſell or deliver, (but only agree, *&c.*) and ſo no Loſs to the Plaintiff, nor Benefit to the Defendant: But the Judgment was affirmed, for it ſhall be intended after a Verdict, That the Horſe was upon the Agreement delivered, and the Promiſe the Inducement thereto, and good.

Term.

Term. Sanct. Trin.

ANNO

15 Car. II. in Banco Regis.

Drake againſt *Beare.*

Debt for Rent on a Leaſe made in an inferior Juriſdiction, but not ſaid that the Lands lay within the Juriſdiction.
S. C. 1 Sid. 151.
1 Keb. 555, &c.
1 Vent. 2, 72.
2 Danv. 301, 11.
Vide ante 50, 69, 96.
Poſt, 137, 153, 156, 208, 289.
1 Vent. 2, 28, 72, 240.
1 Sid. 65, 151, 180.
1 Saund. 74.
Raym. 75.
1 Mod. 32.
2 Mod. 141.
6 Mod. 223, 224.

ERROR of a Judgment in the Court at *Exeter*, where an Action of Debt was brought on a Leaſe for Years at *Topſham*, within the Juriſdiction of the Court, of Lands at *D.* but does not ſay, that the Lands lay within the Juriſdiction of the Court, whereto the Defendant pleads *Nil debet*; and thereupon the Plaintiff had Verdict and Judgment: And this was aſſigned for Error, becauſe it does not appear that the Lands lay within the Juriſdiction of the Court, and if Part of the Cauſe of Action lies within the Juriſdiction of the Court, and Part without, the inferior Court ought not to hold Plea; and though the Iſſue be *Nil debet*, and ſo the Contract in Queſtion, yet an Entry, Suſpenſion, *&c.* might be given in Evidence, whereof they have no Power to inquire, and yet for an Entry, Suſpenſion, *&c.* the Defendant (might ſay) he owed nothing. And of this Opinion were *Foſter*, *Twyſden* and *Kelynge* Juſtices; But *Wyndham* Juſtice on the contrary ſaid, It could be no Reaſon to out a Court of its Juriſdiction by ſuppoſal of a Thing which might have been pleaded, but is not; and he put a Difference between a Caſe, where on the Pleading any Thing appears to have been out of the Juriſdiction, and where any Thing might have been out of the Juriſdiction, but does not appear to be ſo; it ſhall not be ſuppoſed, except it be ſhewn by the Pleading, or otherwiſe appears to the Court: But the three others ſaid, That the inferior Court ſhall not hold Plea, except the whole Matter be within

within their Juriſdiction, * for ſuppoſe here he had declared on a Leaſe made at *Topſham*, and did not ſay that *Topſham* was within the Juriſdiction, the Court would not ſuppoſe it to be within the Juriſdiction without it were ſhewn, no more would they ſuppoſe the Lands (here) to be within the Juriſdiction, it not being ſhewn. And afterwards inaſmuch as all the others were in Opinion againſt him, *Wyndham* conſented to the Reverſal, which was done accordingly. The like Caſe is entered *Hillary* 14 & 15. *Car.* 2. *B. R. Rot.* 240. between *Draper* and *Kent*, in Error of a Judgment in the Palace Court, in an *Aſſumpſit*, where the Plaintiff declared on an *Indebitatus* within the Juriſdiction, for divers Merchandizes to him (the Defendant) ſold and delivered, and did not ſay within the Juriſdiction of the Court.

* P. 105

Vide 2 Danv. 300, 301. 2 Shower, Caſe 430. 2 Lev. 87.

Ante 50, 69, 96, &c.

Slaughter againſt *Tucker*.

ERROR of a Judgment in a *Quod ei deforceat* to the Grand Seſſions in *Wales*, and aſſigned divers Errors, ſome in Fact, others in Law, upon the Record; whereupon the Defendant in the Error demurred for Duplicity, and now the Plaintiff waved the Errors aſſigned on the Record, and aſſigned a new Error, *viz.* That Judgment final was given on a Default after Appearance, where there ought to be a *Petit Cape* only in all real Actions on a Default after Appearance, and a *Grand Cape* on a Default before Appearance, which the Court (agreed and therefore) held this a manifeſt Error.

Judgment ought not to be in real Actions upon Default made, but a *Grand* or *Petit Cape*. Vide 1 Mod. 248, 249. 2 Show. Caſe 274. 1 Vent. 60. 2 Saund. 45. 1 Salk. 216, 217. 6 Mod. 4, 5. 2 Term. Rep. 105.

Double Error aſſigned, waved, and a new ſingle Error aſſigned *ore tenus*.

Smithe againſt *Smithe*.

ERROR of a Judgment in Dower in the Court at *Durham*, for that it was entered *Conſideratum eſt*, and not ſaid *per Cur'*, but held by this Court, it is well enough in Courts of Counties Palatine, or Grand Seſſions, which are not to be reſembled to inferior baſe Courts; otherwiſe of the Court of the Grand Franchiſe of

Conſideratumeſt, and not ſaid *per Cur'*, in what Court good or not. 8. C. 1 Keb. 478, 529. 1 Sid. 147. Poſt, 123.

of *Ely*; and a Caſe was cited where a Judgment there was reverſed for this Cauſe.

* P. 106

* *Holdage* againſt *Hodges.*

Plea, that *Longhope* is ancient Demeſne, Proof that *Hope* is ſo, is not ſufficient, tho' known by the one Name and the other, but it ought to be pleaded. S. C. 1 Sid. 147. 1 Keb. 530. Vide Hob. 188. Dyer 250.

EJECTMENT of Lands in *Longhope*, the Defendant pleads it is ancient Demeſne, Iſſue that it is not ancient Demeſne, and the Book of *Domeſday* brought into Court to try it; wherein it appears, That *Hope* is an ancient Demeſne; and by *Foſter*, *Twyſden* and *Kelynge* Juſtices, This ſhall not maintain the Iſſue for the Defendant, but the Defendant ought to have pleaded, That it is known as well by the Name of *Hope*, as of *Longhope*, and that it is ancient Demeſne; and then it ſhould be tried by the Jury if it be known by the one Name and the other; but it cannot upon this Pleading be ſupplied by any Proof or Examination *dehors*, (*i. e.* Foreign to the Record) *Wyndham* held that it might be ſupplied by proof of Witneſſes, for this is a Trial by the Court on the (*Domeſday*) Book, and not by Jury; and he reſembled it to a Trial of Infancy on Inſpection and Affidavits, but the reſt were contrary, and ſo it was ruled.

Bockenham's Caſe.

Bail for ſtriking in *Weſtminſter-Hall*, Body for Body. S. C. 1 Sid. 211. 1 Keb. 751. Vide 6 Mod. 75, 76. 1 Cro. 373. 12 Co. 71. 22 E. 3. 13. pl. 26. Fitz. Coron. 280, 282. The Party beaten in *Weſtminſter Hall*, or a Church-yard, cannot ſtrike again.

HE was brought into Court immediately for beating of a Man in *Weſtminſter-Hall*, *Sedente Curia*, and obliged to find Sureties to appear to an Indictment, which were four Perſons, each obliged in a Recognizance, and alſo Body for Body to ſtand to the Judgment upon the Indictment. And *Twyſden* ſaid, That though on an Aſſault and Battery in another Place, the Party ſtruck may juſtify the ſtriking the other again, yet he cannot do ſo when he is ſtruck in *Weſtminſter Hall*, ſitting the Court, nor in the Church-yard, *Bockenham* having ſaid that *Harliſton* had ſtruck him firſt: And afterwards in *Hillary* 16 & 17 *Car.* 2. he was tried at the Bar for this upon an Information, and a Verdict againſt him, that he ſtruck, beat, wounded, and evil intreated

intreated *Harlſton*; and he pleaded a Pardon which recited the Information, omiting * *Verberavit* (that he beat) and pardoned the beating, omitting the wounding, and yet the Pardon was allowed. For it was held by the Court, That the Word *percuſſit* (he ſtruck) includes the beating, and the wounding is not material; for the ſtriking made the Offence, be there any wounding or not; alſo the Pardon had general Words, *viz.* all Malefeaſances in the Information contained: And he being diſcharged, was immediately arreſted at the Suit of *Lenthal* the Marſhal for 100*l.* that *Lenthal* had paid for him for an Eſcape, and the Court permitted the Arreſt. * P. 107

Battery and wounding in *Weſtminſter Hall*, Pardon of the Battery is ſufficient, for the wounding is not material.

Arreſt in *Weſt. Hall.*

The Counteſs of *Rutland*'s Caſe.

MAYNARD moved for a Prohibition to a Parſon for digging new Mines of Coal in his Glebe; and alſo for felling Trees: For that it is waſte and prohibitable by the Statute, againſt proſtrating Trees, *&c.* But the Court held, That it lay not for the Mines, for if ſo, no Mines in any Glebe ſhould be now opened.

Parſon, if he may dig Mines. 8. C. 1 Bid. 152. 1 Keb. 557. V. Mo. 917. 2 Rol. 813. 2 Bulſt. 279. 3 Bulſt. 158.

Collins againſt *Man.*

COLLINS having given the Lie to *Man* in *Weſtminſter-Hall*, ſitting the Courts, was bound to his Good Behaviour: But it being proved that *Man* had there given him a Provocation, he was alſo bound to his Good Behaviour.

Surety of Peace for giving ill Language in *Weſtminſter Hall.* 8. C. 1 Keb. 558. Hawk. P. C. 261.

* The *King* againſt the *Inhabitants* of *Woodford*, *Chingford*, and other adjacent Townſhips in *Eſſex.* * P. 108

A *Diſtringas* iſſued on the Statute of *Weſtm.* 2. for throwing down Incloſures againſt the Inhabitants of the next Town, and two of each Town came and pleaded for themſelves and the other Inhabitants of the ſeveral

Fences thrown down in the Day or in the Night by Perſons known.

not within the Statute. V. 1 Sid. 107, 212. 1 Keb. 455. 2 Inſt. 476, 477. Cro. Car. 440. Hob. 138. 1 Roll. Rep. 365. Nelſ. Lutw. 53, 54. 1 Lutw. 157, 158.

ſeveral Towns, that the Fences were thrown down in the Day-time, when the Perſons might be known; and traverſe that they were thrown down in the Night, or at ſuch a Time as the Offenders could not be known; and Iſſue was accordingly joined in the Disjunctive; And now on a Trial at Bar it was ſaid for the Defendants, That if the Proſternation was either in the Day or in the Night ſo publickly, that the Malefactors were known, it is not within the Statute; to which the Court agreed, for the Statute was made to give Remedy in Caſes where the Malefactors not being known, the Parties were without Remedy by Action of Treſpaſs, *&c.* But if it was done either in the Day or in the Night before the Face of the Owners, ſo that they had Remedy by Treſpaſs, *&c.* this is not within the Statute: And on the Evidence it appearing to be done publickly, altho' by the Doers (*i. e.* the Defendants, *&c.*) the Jury, by the Direction of the Court, found for the Defendants.

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* P. 109

* Term. Sanct. Mich.

ANNO

15 Car. II. in Banco Regis.

Kitchen and *Knight* againſt *Buckly.*

Tenants in Common join in Covenant for Repairs. S. C. 1 Sid. 157. Raym. 80.

COVENANT, and declares, That *Randal* deviſed the Tenements to the Defendant, who covenanted with the Leſſor to repair them; and afterwards *Randal* grants the Moiety of the Reverſion to *Kitchen*; and then granted the other Moiety of the Reverſion to *Knight*, and they

they brought a joint Action of Covenant againſt him for not repairing of the Meſſuage; and after Verdict for the Plaintiff, on Performance pleaded, it was moved in Arreſt of Judgment. *1ſt.* That they being Tenants in Common ought not to join in this Action for Repairs, which concerns the Inheritance, but ought to have ſeveral Actions in this Caſe, which favours of the Realty, according to their ſeveral Intereſts. *2dly.* That the Covenant is not with the Leſſor and his Aſſignees, and therefore the Aſſignees ſhall not have any Action (not) being named; whereupon Judgment was ſtaid. But afterwards it was argued by *Jones* for the Plaintiff, and he agreed that in real Actions, or mixed which favour of the Realty, they ought to join; but in Actions perſonal, where Damages only are to be recovered, they may join, and cited *Littl. Sect.* 311, 312, 313. and 18 *H.* 6. 5, 6, 7. And as to the ſecond Objection, he ſaid, That as an Aſſignee of a Leſſee ſhall be charged in Covenant for Repairs (tho' Aſſignees are not named in the Covenant) in reſpect of their having the Poſſeſſion, as in 5 *Co. Spencer's* Caſe; ſo an Aſſignee of the Reverſion ſhall have an Action of Covenant for Default of Repairs in reſpect of his having the Reverſion, tho' Aſſignees are not named in the Covenant. And to this Opinion the whole Court agreed. But as to the firſt Point, it was argued by *Baldwin* for the Defendant, That this Action of Covenant is mixed in the Realty, becauſe it concerns the Inheritance, as well as in the Perſonalty to recover Damages; and in ſuch Caſes Tenants in Common ought to ſever: And he cited *Moor* 452. *Godb.* 90. 280. *Dy.* 326. *Sect.* 314, 317. That they ſhall not join in an Aſſiſe or an Avowry for Rent becauſe mixed. Nor in a *Ceſſavit*, *Waſte*, *&c. Mo.* 40. and in *Pyott* and *St. John's* Caſe 2 *Cro.* where *Pyott* claimed by two Grants of the Reverſion of ſeveral Parts at ſeveral Times, and he brought an Action of Covenant for Repairs, and it was allowed; for that both Grants were to one and the ſame Perſon, and he could not be Tenant in Common with himſelf; but here the Grants are to ſeveral Perſons and at ſeveral Times, by ſeveral Grants. But held by the Court, That this was merely a perſonal Action, wherein Tenants in Common may join: And in *Pyott's* Caſe he was Tenant in Common with himſelf, for he had the Fee in part of the Reverſion,

1 Keb. 565, 572. Vide 3 Lev. 258, 351, 354. 362. 3 Mod. 322. 2 Lev. 27, 188, 228. 2 Saund. 115, 116. 1 Vent. 167, 168. 1 Salk. 10. 2 Salk. 423, 436, 440, 444. 1 Danv. 5, 6, 7.

Aſſignee of a Reverſion ſhall have Covenant to repair, againſt the Leſſee, tho' not named in the Leaſe.

* P. 110

V. 1 Danv. 3. Pl. 13. 1 Bac. Abr. 31.

ſion, and for Years only in the Reverſion of the Reſidue; and by the whole Court, Judgment was given for the Plaintiff in this Caſe.

Lee againſt *Rogers.*

Aſſumpſit on a Promiſe twenty Years before, no Benefit of the Statute without pleading it. S. C. 1 Keb. 566, 578. Raym. 86.

ASSUMPSIT on a Promiſe made the firſt of *May*, 3 *Car.* 1. for Money lent: The Defendant pleads, That the Writ was firſt brought the 4th of *February*, 14 of this King, and that he did not promiſe within ſix Years before the ſaid 4th of *February*. The Plaintiff replies, That he aſſumed within ſix Years before the ſaid 4th of *February*: And after Verdict it was moved in Arreſt of Judgment, for that it appears by the Declaration, that the Cauſe of Action did ariſe above ſix Years before the Action brought. 2. That the Replication is a Departure from the Court. But by the Court, Judgment was given for the Plaintiff; for firſt, Tho' the Cauſe of Action appears to be 20 Years before the Action brought, yet the Plaintiff ſhall recover, if the Defendant does not plead the Statute, which was made for the Eaſe of thoſe who would take Advantage thereof, but the Court ſhall not give the Defendant Advantage thereof if he will not plead it. 2*dly*. The Replication is no Departure from the Declaration, for the Time put in the Declaration was not material, for he might * declare of an *Aſſumpſit* at any Time, but when the Defendant makes the Time material by his Plea, the Plaintiff may by his Replication anſwer to that Plea, for maintaining his Action by the Time that before was not material; and they gave Judgment for the Plaintiff. And in *Hillary* Term the 15th of *Car.* 2. in the Common Pleas, between Sir *George Bremion* and Sir *John Evelyn*, on a Promiſe made in 1646, the Defendant pleaded the Statute of Limitations; to which the Plaintiff replied, That the Defendant was a Member of the Houſe of Commons till 1648, and that then the Government was uſurped, and no Courts erect: And that he brought his Action as ſoon as the Courts were erected by the King's Reſtoration. And on Demurrer it was adjudged, (as I heard) *Firſt*, That none ſhould take Advantage of the Statute without pleading it. *Secondly*, That

Aſſumpſit 3 *Car.* brought 14 *Car.* pleads *non Aſſumpſit*, within ſix Years before the 14th. Replication, that he aſſumed within ſix Years before the ſaid 14th, no Departure.

* P. 111

Privilege of Parliament in Courts not open, not excepted out of the Statute Limitations of

That the Replication is no Departure, becauſe it is not but an Anſwer by the Time to the Plea, which before was not material. *Thirdly*, That Privilege of Parliament, nor the Courts not being open, are not any Excuſe againſt the Statute of Limitations, not being excepted out of the Statute; and a Man might here file an Original againſt a Member of Parliament without Breach of Privilege, and continue it till his Privilege be determined.

James againſt *Morgan.*

ASSUMPSIT to pay for a Horſe a Barley-Corn a Nail, doubling it every Nail; and avers that there were thirty-two Nails in the Shoes of the Horſe, which being doubled every Nail, came to five hundred Quarters of Barley: And on *Non Aſſumpſit* pleaded, the Cauſe being tried before *Hyde* at *Hereford*, he directed the Jury to give the Value of the Horſe in Damages, being 8*l.* and ſo they did: And it was afterwards moved in Arreſt of Judgment for a ſmall Fault in the Declaration, which was over-ruled, and Judgment given for the Plaintiff.

Aſſumpſit to pay for a Horſe a Barley-corn a Nail, &c. S. C. 1 Keb. 569. 6 Mod. 305. 1 Jo. 138. Vide *Matteſh Wallifii*, cap. 31. Q. Raym. 77.

* *Mills* againſt *Monday* and his *Wife.*

* P. 112

ACTION for that the Wife of the Defendant having *colloquium* of the Plaintiff, being a Carrier, ſaid of him, *He has made falſe Letters, he has Couſined my Huſband of* 21*l. and gave me a falſe and forged Acquittance:* After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, and the Judgment was ſtayed becauſe the *Colloquium* was not laid of his Trade of a Carrier, but (only) of himſelf. And it being moved again at another Time, and the Court continuing in their former Opinion, Judgment was given, That the Plaintiff ſhould take nothing by his Bill.

Couſiner, *He made falſe Letters*, ſpoken of a Carrier without a *colloquium* of his Trade, not actionable. S. C. 1 Keb. 571, 612. 1 Sid. 155. Vide poſt, 115.

Biſco, Leſſor of *Strode,* againſt Dr. *Holſe.*

Chancellor of a Cathedral is enabled by Stat. 32 H. 8. to make Leaſes. S. . . . Sid. 258. 2 Keb. 576.

IN Evidence to a Jury at the Bar in Ejectment, on a Leaſe made by the Chancellor of a Cathedral Church, not being confirmed by the Dean and Chapter: There was a Doubt made, Whether this being for twenty-one Years or three Lives, ſhould bind the Succeſſor within the Statute 32 *H.* 8. *c.* 28. or not? And by the whole Court, it ſhall bind without Confirmation, for he is a Prebendary and more, for he hath a Prebend, and beſides that he is a Dignitary, and is ſeized in Fee in Right of his Church within the Words of the Statute; and they would not permit it to be found Specially, as it was deſired by the Attorney General; for they ſaid, They would not have it made a Doubt.

Doug. 573.

Note, in 3 *Cro.* 350. *Watkinſon* againſt *Man,* it was adjudged on a Special Verdict, That a Leaſe by a Prebendary ſhall bind the Succeſſor; and it is there ſaid by *Fenner* to have been ſo adjudged in the Caſe of a Treaſurer of a Church. But ſee 1 *Inſt.* 300. *b.* where a Prebendary is taken as a Parſon or Vicar, not to have the whole Fee in him.

* P. 113

* And *Note,* The Statute excepts Parſons and Vicars, but not Prebends, and *Hyde* ſaid, That Precentors of old Foundations are enabled by the Statute, but otherwiſe perhaps of new Foundations: And whereas a Caſe was cited in the Exchequer, That Leaſes made by the Chanters of *Paul's* ought to be confirmed; *Hyde* ſaid, That they were not properly Chanters, but of the leſſer Order, and only Singing Men: But Chanters, Precentors, *&c.* are of the greateſt Order.

Show. 199.

Tilford againſt *French.*

A parol Submiſſion to an Award, does not imply a Promiſe to perform it.

DEBT for 50*l.* and declares, That the Plaintiff and Defendant mutually ſubmitted to the Award of *J. S.* who awarded, that the Defendant ſhould pay to the Plaintiff 50*l.* and that the Plaintiff on Payment thereof ſhould deliver to the Defendant, certain Writings,

tings, and alſo make to him a Releaſe. After Verdict for the Plaintiff Judgment was ſtayed and given for the Defendant, becauſe the Award is void; for that the Defendant had no Remedy for the Writings and the Releaſe upon this parol Submiſſion; for it did not imply any Promiſe to perform it, and ſo it is an Award of one Part only.

S. C. 1 Sid. 160. 1 Keb. 599, 600. 1 Danv. 27, 3. Vide 2 Roll. Rep. 194. 2 Vent. 242. 2 Salk. 676. 1 Salk. 75. 6 Mod. 82, 160. 2 P. Wms. 450. 1 Burr. 275.

The *King* againſt *Chaloner*.

IT was moved to quaſh a Record of a Force, made on the View of a Juſtice of Peace on the Statute of *R.* 2. becauſe it was only *Anno Regis Car.* 2. omitting *Regni*; But by the Court, It cannot be intended the Year of his Life but of his Reign; for it is not the 14th Year of the King, except it be the 14th Year of his Reign, for he is not King but from the Commencement of his Reign; but they ſaid, that it is quaſhable by motion without Writ of Error, if it had been inſufficient.

The Year of the King, and the Year of the King's Reign, all one. S. C. 1 Sid 156. 1 Keb. 572. Record of a Force on the Statute R. 2. quaſhable by Motion.

Smithe againſt *Barret* and *Clifford*.

* P. 114

EJECTMENT of a Boilery of Salt, tried at the Bar on a Leaſe by the Corporation of *Droitwich*, and Proo, That the Pit is divided into twenty or thirty Boileries, *viz.* That one ſhall have the firſt Boilery, and another the ſecond; and ſo of the Reſidue, which conſiſts in this, That one ſhall have the firſt Tub of Water that is drawn out of the Pit, and another the ſecond Tub, *&c.* And the Water that is ſo drawn by Officers appointed, makes the Boileries.

Boilery of Salt, what, an Ejectment lies thereof. S. C. 1 Sid. 161. 2 Danv. 751. pl. 2. Vide Co Litt 4. b. Hard 57 58. Noy. 109. 121. 1 Roll. Rep. 483. Vide ib. 55. Runnington on Ejectments 35.

3 Leon. 210. Palm. 413. Ante 58. Hetl. 146 Litt. Rep. 301, Poſt. 213. 1 Burr. 133. Doug. 305. 1 Term. Rep. 11.

Gilbert againſt *Martin*.

COVENANT, and declares of a Leaſe made in *Hampſhire*, of a Meſſuage in *Berkſhire*; and aſſigns a Breach in not repairing of the Houſe: The Defendant pleads

Covenant in *Berks* to repair a Houſe in *Hampſhire*.

S. C. 1 Sid. 157. 1 Keb. 578. Raym. 85.

Plea, That he hath not broken the Covenant, &c. Stra. 776. Cowp. 776. 2 Term. Rep. 421. Poſt, 183.

pleads that he had not broken the Covenant, and Iſſue thereupon tried in *Hampſhire*, where the Covenant is ſuppoſed to be made, and Verdict for the Plaintiff: Whereupon it was moved in Arreſt of Judgment, That it ought to have been tried in *Berkſhire*, where the Houſe is, and where the Repairs are to be made: To which it was anſwered, That where the Cauſe of Action ariſes on a Thing in two Counties, the Plaintiff has Election to bring it in which County he will; as where it ariſes on the Covenant made in one County, and on the not repairing in another. To which it was replied, That true it is, ſo it is in many Caſes, where on a general Iſſue divers Things in divers Counties are to be tried; as where a Man brings Debt for an Eſcape on an Arreſt in one County, and an Eſcape in another, there on *Nil debet* both are triable, *viz.* the Arreſt and the Eſcape, and both are triable in that County where the Plaintiff will at his Election bring his Action; and yet there if the Arreſt be traverſed, the Trial ſhall be in the County where the Arreſt is alledged; and if the Eſcape be traverſed, it ſhall be tried where the Eſcape is alledged. And here when the Breach is alledged in not repairing, and the Iſſue is *Non infregit, &c.* this ſhall be intended only an Anſwer to the Breach (alledged) *viz.* That he hath not broken the Covenant for want of Repairs; and ſo that is the only Matter triable, and that only where the Houſe lies, and cited *Bro. Iſſue* 19. 22 *H.* 6. 13, 23. 16 *H.* 7. 1. * 44 *E.* 3. And of this Opinion were the whole Court, except *Wyndham*, who agreed, That a particular Iſſue ſhall bring the Trial to the County where the Matter in Iſſue aroſe, and out the Plaintiff of his Election; but he held that *Non infregit Conventionem*, is not ſuch a particular Iſſue, but other Things may be given in Evidence thereupon: But by the Opinion of the three others, Judgment was ſtayed.

* P. 115

Terry againſt *Hooper*.

Colloquium of the Party, but the Words ſpoken of him and of his Trade.

CASE, for that the Plaintiff being a Lime-burner, the Defendant having *Colloquium* of him, ſaid of him and of his Art, *He is a cheating Knave:* After Verdict for the Plaintiff on Not Guilty, it was moved in Arreſt

Arreſt of Judgment, That here is no *Colloquium* laid of his Art, but only of himſelf; and the laying the Words to be ſpoken of him and his Art, is but a *Colloquium* of the Plaintiff himſelf, and *cheating Knave* of a Lime-burner is not actionable if it be not ſpoken with reference to his Trade: Whereupon Judgment was ſtayed, and in *Hillary* Term next following, *Jones* moved for Judgment, and cited 1 *Cro.* 371. 2 *Cro.* 674. That the Words being laid to be ſpoken of him and his Trade, are ſufficient without any *Colloquium* either of him or his Trade, they being found by the Jury to be ſpoken of him and his Trade; and of this Opinion were *Wyndham* and *Twyſden*, they being now found ſpoken of him and his Trade. But *Hyde*, Chief Juſtice, and *Kelynge* were of a contrary Opinion, and the Judgment was ſtayed, the Court being divided. And by *Kelynge*, *Wyndham* and *Twyſden*, an Action lies for ſpeaking ſcandalous Words of a Lime-burner, or of any Man of any Trade or Profeſſion, be it ever ſo baſe, if they are ſpoken with Reference to his Profeſſion.

S. C. Raym. 86. 1 Keb. 60. 2, 644. V. ante 112. 4 Bac. Abr. 513.

Scandalous Words with reference to a Profeſſion, tho' baſe actionable.

* *Bawdry* againſt *Buſhel.* * P. 116

A Prohibition prayed on a Cuſtom alledged, That all Perſons who have Lands in ſuch a Village, but inhabiting out of the Vill ſhall pay 4*d. per* Acre only in Satisfaction of Tithes: And that the Defendant here ſued him inhabiting out of the Vill for Tithes in kind in the Spiritual Court. But the Prohibition was denied, for the Cuſtom is unreaſonable to give a greater Privilege to Foreigners than to Inhabitants, who are at greater Charge, in reſpect of their Reſiancy, to Repairs and Veſtments for the Church.

Cuſtom for Foreigners to pay 4*d. per* Acre for Tithes.

Wheeler againſt *Welch.*

ACTION was brought in *London* for calling the Plaintiff *Whore* there, which was removed hither by *Habeas Corpus*, and afterwards remanded and tried in the Sheriff's Court in *London*; and on the Trial, the Words

Caſe for calling *Whore* in *London*, proved to be ſpoken in *Middleſex.*

S. C. Raym. 81. 1 Keb. 578, 603. Vide Nelſ. Lutw. 332, &c. ib.

Words were proved to be ſpoken at *Clerkenwell*, *i. e.* out of the City and the Liberties thereof, for which I demurred on the Evidence, for that thoſe Words ſpoken at *Clerkenwell*, are not actionable. And the Judge overruled the Demurrer preſently; whereupon I prayed him to ſeal a Bill of Exceptions. But the Parties being poor, I upon their Requeſt waved it, and a Verdict was given for the Plaintiff and 45*s.* Damages.

Note, The Defendant might have pleaded, That the Words were ſpoken at *Clerkenwell*, and have traverſed the ſpeaking in *London*; and if the Judge had denied to have received the Plea, the Court of King's Bench would have granted a Prohibition.

* P. 117 * The *Dean* and *Chapter* of *St. Paul's* againſt *Capell.*

Obligation conditioned to pay ſo much as *J. S.* ſhall appoint, is within the Statute of 3 *Jac.* 1. of finding Bail in Error on a Judgment thereupon, S. C. 1 Keb. 613, 690.

DEBT on an Obligation conditioned to pay to *Biggs* ſuch (a Sum of) Money as *J. S.* ſhould declare upon an Account by him ſtated between the Plaintiff and Defendant, to be due from the Defendant to the Plaintiff. Whereto the Defendant pleads, That *J. S.* had not declared any thing due to the Plaintiff, Iſſue thereupon and Judgment for the Plaintiff, and thereupon Error brought, and the Queſtion was, Whether the Plaintiff in Error ſhould find Bail on the Statute of 3 *Jac.* 1. *c.* 8? For it was objected, That this was not an Obligation for the Payment of Money *only* within the Words and Intent of the ſaid Statute, which extends only where a certain Sum is expreſſed in the Condition; and therefore *Yelv.* 227. *Girling's* Caſe, where a Man recovered on an *infimul computaſſet*, it was adjudged not to be within the Statute: And a Caſe is there cited, That a Recovery in Debt upon Arbitrament is not within the Statute: And a Writ of Error is a Writ that every Subject of Right ought to have, and therefore the Statute made in Reſtraint thereof ſhall be taken ſtrictly. And of this Opinion was *Kelynge*, but the reſt of the Juſtices *contra*, *viz.* That altho' Writs of Error are Writs of Right, yet they are for the moſt part uſed for Delay, for Remedy whereof the ſaid Statute was made, and therefore was to be taken beneficially for

Writ of Error a Writ of Right.

for the Subject. They agreed the Case of *Girling*, and that of Debt on an Award, for those are not Actions on a Bill or Obligation for the Payment of Money which are only within the Words of the Statute; But this Action is grounded on an Obligation made for the Payment of Money only, which altho' it be not certain when the Obligation is made, is yet certain before the Action is brought; and they ruled, That the Plaintiff should take his Execution, notwithstanding the Writ of Error brought, except the Plaintiff in Error gave in Bail before such a Day.

* The *King* against *Thomas*. * P. 118

Trial for Murder in the next *English* County, Plea that he was formerly acquitted in the Grand Sessions in *Wales*. S. C. 1 Sid. 179. 1 Keb. 663. Hawk. P. C. 121. Wilf. 320. Atk. 175, 182.

THOMAS was indicted at *Hereford*, the next *English* County, for a Murder committed at *Coyty* in *Wales*: Whereto he pleads, That he was at another Time (*i. e.* formerly) tried and acquitted of this Murder at the Grand Sessions of *Wales*. The Attorney General replied, That *Coyty* was Parcel of one of the Lordships Marchers; and that the Stat. 26 *H.* 8. *c.* 6. enables the Justices of Gaol Delivery in the next *English* County to try Traitors, Murderers, and Felons, for Facts done in any Lordship Marcher, as if it had been committed in the *English* County; and that the Acquittal in the Lordships shall not be at any Bar. Whereupon the Defendant demurs; and the Case was oftentimes argued at the Bar, and it was at length resolved by the whole Court, That the Defendant should be discharged; for the Reason of the making of the Statute of 26 *H.* 8. was the irregularity of Proceedings in the Lordships Marchers. And by the Statute of 27 *H.* 8. *c.* 26. the Lordships Marchers are divided into the six new Counties of *Wales*, and the *English* Counties adjacent, and the *English* Laws to be used in *Wales*, and they are thereby enabled to send Knights and Burgesses to the Parliament in *England*; and altho' by a *Proviso* in this Statute, the Trials for Murder, Treason and Felony done in the Lordships Marchers are saved, yet that was before the Erection of the Court of Grand Sessions, which was done by the Act of 34 *H.* 8. *c.* 26. And that divides all the Counties into Divisions wherein the Grand

Grand Seſſions are to be held, where the Trials are (to be) according to the Laws of *England*; and therefore, where after this Act a Man is tried and acquitted at the Grand Seſſions of Treaſon, Murder and Felony, he may plead it, and not be tried again for the ſame Offence.

Note, This Matter was doubted at the Grand Seſſions, and therefore to have it ſettled here, it was removed hither by *Certiorari*, and reſolved as aforeſaid.

* P. 119

* The *King* againſt the *City* of *Canterbury*.

A *Mandamus* to reſtore an Alderman to his Precedency, &c. Vide poſt, 123, 306.

A *Mandamus* to reſtore an Alderman, expelled from his Priority and Precedency of Place of Alderman; and on the Return thereof, divers Exceptions were taken to the Return and diſallowed; but at length on view of the Return it was held good, and nothing further done.

Note, This kind of *Mandamus*.

And ſee hereafter *pag.* 187. a *Mandamus* to grant an Adminiſtration. And in 2d *Shower*, *pag.* 48. to prove a Will.

Coxe againſt *Smithe*.

Caſe for a falſe Oath, cauſing him to loſe his Office. Vide ante 97. Hard. 221, 222, &c. 1 Sid. 131.

CASE for that he being an Officer of the Cuſtom-Houſe, the Defendant made a falſe Affidavit againſt him in Chancery, touching malfeaſance in his Office; and afterwards petitioned the Commiſſioners of the Cuſtoms againſt him, and thereupon cauſed him to be turned out of his Place: After a Verdict (upon Not guilty) for the Plaintiff, it was moved in Arreſt of Judgment, That no Action lies for the making of a Falſe Oath, *Owen* 258. 2 *Gro.* 601. *Hutt.* 11. *Poph.* 144. 1 *Leon.* 107. and that no Action lies for the Petition, becauſe it is done in a Courſe of Juſtice. But (ſaid) by the Court. The Action is not founded on the Oath, nor on the Petition, but thoſe are only Inducements to prove the malicious procurement to have him turned out of his Place; and that it was falſly and maliciouſly done, is

is now found by the Verdict; and they gave Judgment for the Plaintiff.

* *Tombes* againſt *Ethrington.* * P. 120

A Pardon excepting Murder, does not except a *Felo de ſe.*
S. C. 1 Keb. 66, 548, 628. 1 Sid. 167. 1 Saund. 361. Vide ante 8, 26. 2 Show. 334. 1 Mod. 102. 2 Mod. 53.

A *Scire Facias* as Adminiſtrator of *Tombes* the Inteſtate, upon a Judgment recovered againſt the Defendant by the Inteſtate: The Defendant pleads that the Inteſtate killed himſelf, and ſhews an Inquiſition found thereof before the Coroner, in the Times of the late Uſurpation. The Plaintiff replies the general Pardon of 12 *Car.* 2. whereby the King pardons all Felonies, Debts, *&c.* The Defendant demurs; and now it was adjudged on Argument, That by the Pardon the Crime of *Felo de ſe* was pardoned, as was formerly adjudged in the Caſe of the King and *Ward*, the Executor of *Wentworth*, in *Mich.* 12 *Car.* 2. *in B. R.* (which ſee here before *p.* 8.) but the Pardon does not reſtore the Debt veſted in the King by the Inquiſition before the Pardon, without Words of Reſtitution. But to this it was argued, That the Inquiſition taken in thoſe Times was void, and is not confirmed or made good by the Stat. 12 *Car.* 2. *c.* 3. for the continuance of judicial Proceedings not being inſerted under any of the Titles in that Act; whereto it was anſwered and reſolved, That whether it were committed by the Act or not, it was yet good at the Common Law, for the Coroner being elected by the County, his Office does not determine by the King's Death. But they would not award Execution for the Plaintiff, becauſe they held the King had Title to the Debt. Whereupon, one *Lock* was promiſed a Grant of the Debt by the King; and in *Hillary* 16 *Car.* 2. *B. R.* brought a *Scire Facias* againſt *Ethrington*, and ſhewed the Felony *de ſe*, and the Inquiſition, and the King's Grant to him: The Defendant pleads the general Pardon, and it was now reſolved again, That the Crime of *Felo de ſe* is pardoned, and is not within the Exceptions of Murder in the Act of Pardon. And *Secondly*, That though the Crime be pardoned, yet the Debt is not reſtored to the Adminiſtrators, being veſted in the King by the Inquiſition, no Words of Reſtitution being in the Act. But the third Queſtion was, Whether the Debt is not extinguiſhed in the Hands of the Debtor, by

Coroner elected by the County does not determine by the King's Death.

The King's Pardon of the Crime, does not reſtore the Goods veſted without Words of Reſtitution.

by the fifth Branch of the Act, which pardons and releases *all Causes, Things, Quarrels, Suits, Judgments and Executions not excepted in the Act.* And as to this it was said for the Plaintiff. *First*, That the Commencement of this Clause is a pardon of *Treasons, Offences*, &c. and the Words *Judgments and Executions* shall be * satisfied, and refers only to Judgments and Executions for the Offence, and not Judgments and Executions for the Debt. *Secondly*, The Clause shall be satisfied with Judgments and Executions originally (due) to the King, and shall not include Debts which came to the King by Assignment or Forfeiture. *Thirdly*, The Pardon is to all Subjects, and the Defendant in his Plea avers that he is *modo subditus*, and that may be by Naturalization since; and if he was not a Subject at the Time of the Act, he is not within the Pardon; and as to the first and second of those Objections it was answered by *Jones*, That though the Clause in the Statute speaks of Treasons and such Offences, yet afterwards the Clause contains Rents, Arrears of Rents, Forfeitures, Penalties, and many other general Words, as Bonds, Securities, &c. and therefore it is to be taken generally, and shall be extended to the Case in Question: And of this Opinion were *Hyde* and *Twysden* on the first Argument, but *Wyndham* and *Kelynge* were of a contrary Opinion. And as to the Case of Sir *George Binion*, cited to be lately adjudged in the Exchequer, That Debts which came to the King by Assignment, were not pardoned; Sir *George Binion* was an Accomptant, and in Arrear; and by the tenth Clause of the Act, such Accounts are excepted out of the Pardon; for *J. S.* being indebted to *Binion*, *Binion* assigned the Debt to the King for the better Recovery thereof, to be paid to the King in Satisfaction of his Accounts, and the Court at first held it discharged: But afterwards for that it came to the King in Lieu of the Account, they by Equity of the Act held it to be excepted as the Account itself was; but *Hale* Chief Baron, and the whole Court of Exchequer, always ever since the Pardon have adjudged, That Debts coming to the King by Assignment, were pardoned as well as Debts originally due to him. And as to the third (Question) the Word *subditus* shall be taken in the more worthy Sense, *viz.* a Subject born; as the Feast of St. *Michael* shall be taken for St. *Michael* the Arch-

* P. 121

The King pardons Judgments and Executions, a Judgment that comes to him by Assignment is pardoned thereby.

Archangel. But it was adjourned, and the Caſe was again argued at the Bar in *Eaſter* Term, 16 *Car.* 2. and then *Hyde* Chief Juſtice doubted more than before; but *Kelynge* having ſpoken with the Chief Baron *Hale*, and being ſatisfied by him of the Courſe of the Exchequer, and the Caſe of *Binion* to have been as was before declared by *Jones*, he altered his Opinion, and held the Debt to be diſcharged in the Hands of the Debtor. *Wyndham* continued his former Opinion, but it was adjourned; and afterwards in *Trin.* 16. *Hyde* being * dead, it was adjudged by *Twyſden* and *Kelynge*, That the Debt wa diſcharged; *Wyndham* continuing his former Opinion. But all agreed that *modo ſubditus* was ſufficient, and ſhall be intended to have been always ſo. And Judgment was given for the Defendant.

* P. 122

Plea that he is now a Subject, intended a natural one, and that he was always ſo.

Palmer againſt *Fletcher.*

CASE was brought for ſtopping of his Lights. The Caſe was, a Man erected a Houſe on his own Lands, and after ſells the Houſe to one, and the Lands adjoining to another, who by putting Piles of Timber on the Land, obſtructed the Lights of the Houſe: And it was reſolved, That although it be a new Meſſuage, yet no Perſon who claims the Land by Purchaſe under the Builder, can obſtruct the Lights any more than the Builder himſelf could, who cannot derogate from his own Grant, by *Twyſden* and *Wyndham* Juſtices, *Hyde* being abſent, and *Kelynge* doubting. For the Lights are a neceſſary and eſſential Part of the Houſe. And *Kelynge* ſaid, Suppoſe the Land had been ſold firſt, and the Houſe after, the Vendee of the Land might ſtop the Lights; *Twyſden* to the contrary ſaid, Whether the Land be ſold firſt or afterward, the Vendee of the Land cannot ſtop the Lights of the Houſe in the Hands of the Vendor or his Aſſignees; and cited a Caſe to be ſo adjudged; but all agreed, That a Stranger having Lands adjoining to a Meſſuage newly erected, may ſtop the Lights; for the Building of any Man on his Lands, cannot hinder his Neighbour from doing what he will with his own Lands; otherwiſe if the Meſſuage be ancient, ſo that he has gained a Right in the Lights by Preſcription. And afterwards in *Mich.* 16 *Car.* 2. *B. R.* a like

A Man builds a new Houſe on Part of his Lands and after ſells the Houſe to one, and the Lands to another, he cannot obſtruct the Lights.

S. C. 1 Sid. 167, 227. Raym. 87. 1 Keb. 553, 625, 794. Vide 6 Mod. 116, 314. 1 Mod. 55. 1 Mod. 55. 1 Vent. 237, 239, 274. 2 Lev. 194. 1 Sid. 167. Raym. 87. 3 Black. Com. 217. Lill. Ent. 31, 82, 83, 516.

a like Judgment was given between the ſame Parties, for erecting a Building on another Part of the Lands purchaſed, whereby the Lights of another new Meſſuage were obſtructed.

* P. 123 * The *King* againſt the *Governors* of the new *Water-works, London.*

A *Mandamus* to reſtore the Treaſurer of the new Water works, *London.* S.C. 1 Sid. 169. 1 Keb. 625. V. ante 119. Poſt, 306.

A *Mandamus* was prayed for reſtoring him to the Treaſurerſhip of the Company, which was much oppoſed by *Coleman* and *Powys*, becauſe it was only a Thing of private Concernment, and not touching the Publick; and of this Opinion was *Wyndham*, and that it did not lie, nor for a Fellow of a College, nor had it been ever ſeen that a *Mandamus* was granted to reſtore an Abbot, a Monk, a Knight-Templar, or Hoſpitaller, *&c.* But it was ſtrongly preſſed by *Maynard*, and the Attorney General, and *Wylde* (all of the King's Counſel) to have the Writ, and they ſaid it concerned the King, who had an Intereſt in the Waterworks, *viz.* certain Parts or Shares. And *Twyſden* held, That the *Mandamus* well lay, but to *Hyde*, Chief Juſtice, it ſeemed that it did not, becauſe a private Corporation and a private Office; but at length they conſented that the Writ ſhould go, and they would conſider further upon the Return thereof.

The *King* againſt *Cook.*

No Pledges on an Information on 5 *Eliz.* but in Debt, *qui tam, &c. Præceptum eſt*, and *conſideratum eſt*, and not ſaid *per Curiam.* S. C. 1 Keb. 631. Ante 105. 1 Wilſ. 226. Stra. 857.

AN Information at the Seſſions of the Peace in the County of *Hertford* for uſing the Trade of a Mercer; and Judgment thereupon, on which Error was brought here and aſſigned, that there were not any Pledges *de Proſequendo*, and the Plaintiff might be nonſuited and amerced. But ſaid by the Court in Debt *qui tam* he may be nonſuited and amerced, but not in an Information, and therefore there need not Pledges. 2*dly*, The *Venire* is *Præceptum eſt*, and it is not ſaid *per Curiam*, and the Judgment is *conſideratum eſt*, and not ſaid *per Curiam.* 3*dly*, The *Venire facias* is *duodecim liberos & legales homines*, and it is not ſaid *de Burgo* or *de Civitate de Hertford*; and for theſe laſt Cauſes Judgment was reverſed.

Term.

Term. Sanct. Hill.

ANNO

15 & 16 Car. II. in Banco Regis.

The *King* againſt *Sir John Jackſon.*

IN Treſpaſs between *Sir John Jackſon* and *Primate*, the Verdict being againſt *Primate*, he indicted the Witneſſes of Perjury; which being at Iſſue and brought to Trial, *Sir John* commanded his Servants to beat and impriſon the Witneſſes which were to prove the Perjury, ſo that they did not come to give Evidence, whereupon the others were acquitted. And *Primate* (after) moved for a new Trial of the Perjury, which was denied, it being in a Criminal Caſe, wherein the Party being once acquitted, ſhall never be tried again. But the Court directed an Information againſt *Jackſon*, which was done, and he convicted. And now it was moved in Arreſt of Judgment, That the Information was by way of Recital how an Iſſue was joined, and does not poſitively ſay, then an Iſſue was joined and appointed to be tried, *&c.* But it was not allowed, it being only by way of Inducement to the Suit on the Information, which is for the Battery and the detaining the Witneſſes. 2d. Objection, That the Information is againſt *Jackſon* for procuring *A.* and *B.* to beat and impriſon the Witneſſes, and *Jackſon* only tried and convicted, and the others never yet tried; ſo that it does not appear that they were guilty of the Battery and Impriſonment, and then *Jackſon* cannot be guilty of the procuring of that which does not appear to have been done. But it was reſolved, That he commanding the ſame to be done, is

No new Trial in a criminal Caſe where Defendant is acquitted. V. ante 9, 10. 1 Sid. 153, 154. 1 Keb. 124, 127, 484, 546, 566, 568.

Information againſt *A.* for procuring *B.* and *C.* to commit a Treſpaſs, he may be convicted of the Procurement, tho' the others are not

convicted of the Fact. Ante 9, 10, 62. Poſt, 125, 126.

is a Principal and not an Acceſſary, and he being found guilty, it ſhall be intended that the Fact was done; and the Court impoſed a Fine of 1000*l.* upon *Jackſon*, and that he ſhould find Sureties for the Good Behaviour for a Year before he ſhould be diſcharged. But being ſpecially * committed by the Court at the King's Suit, they ordered that no Action or Execution ſhould be put upon him during his Impriſonment without Licence of the Court; And afterwards *Primate* moved to have Part of the Fine allowed him towards his Charges, and thereof the Court would conſider. And *Note* in the ſame Term, in Sir *Charles Stanley*'s Caſe, the Court would not permit him, being in Priſon at the King's Suit, to be charged.

* P. 125

A Priſoner for the King not to be proſecuted at a Subject's Suit. The Court gave the Proſecutor part of the Fine. Poſt, 146. 1 Sid. 122. Kel. 86, 87.

Sherock againſt *Boucher*.

A Prebendary who has a Peculiar, leaſes his Prebend, Q. if the Leſſee may hold Courts. S. C. Raym. 88. 1 Bl. Rep. 81. Doug. 378. 1 Term. Rep. 552.

A Prohibition was prayed, on which the Caſe appeared to be, That a Prebendary who had a peculiar Juriſdiction, made a Leaſe of his Prebend, *with all Profits, Commodities and Advantages, &c. thereto belonging*. And the Queſtion was, Whether the Eccleſiaſtical Juriſdiction ſhould paſs to the Leſſee, ſo that he might make a Commiſſary to hold Courts or not? And the Chief Juſtice and *Wyndham* held, That it ſhould not, for that it is annexed to the Spiritual Perſon, and not to the Lay-body of the Prebend: And *Wyndham* ſaid, The Commiſſary is only the Deputy of the Prebendary (as Prebendary) which his Leſſee could not make for him. *Kelynge* and *Twyſden* held to the contrary, and that it was annexed to the Body of the Prebend, and paſſed with it. But this being the firſt Motion, it was appointed, That the Plaintiff ſhould declare on his Suggeſtion, and that the Defendant ſhould demur thereupon, ſo as to bring the Point judicially in Queſtion.

The

The *King* againſt *Alderman Sterling* and *ſeventeen Others.*

INFORMATION againſt them, for that they with divers others of the Brewers of *London* did factiouſly and unlawfully aſſemble themſelves, and conſpire to impoveriſh the Exciſemen, and made Orders, That no Small-Beer called Gallon Beer ſhould be made for ſuch or ſo long Time to be ſold to the Poor, nor no Ale but of ſuch a Price, with intent to move the common People to pull down the Exciſe-Houſe, and bring the Exciſe-Men into the Hatred of the People, and to impoveriſh and diſable them from paying their Rent (being then 118000*l. per Ann.*) to the King; and * on Not guilty pleaded, they being found guilty on a Trial at Bar of aſſembling and conſulting to impoveriſh the Exciſe-Men, and Not guilty of the Reſidue, It was moved in Arreſt of Judgment, *1ſt.* That there wanted *Vi & Armis* in the Information; But held by the Court it was well enough without it, the Information being for plotting and contriving which may be without Force. *2dly.* That they are found guilty only of the conſpiring without any Act done, for they are found Not guilty of the making the Orders, *&c.* and this is only againſt private Men, and not puniſhable at the King's Suit, but by Suit by the Parties, if they are endamaged thereby. *3dly.* That the contriving to impoveriſh the Exciſe-Men, is uncertain what is meant, and it may be by bringing Actions againſt them for juſt Debts. To the firſt of which Objections it was anſwered by the King's Counſel, That this Conſpiracy tends to the Public, becauſe it concerns the Loſs of the King's Revenue. And as to the ſecond Objection, the Information ſays, That it was factiouſly and unlawfully, and is ſo found by the Jury, which well enough explains what kind of Impoveriſhment is intended, and a conſpiring to do an unlawful Thing is puniſhable without any Overt-act done, as 9 *Co. Rep. Poulter*'s Caſe, *Moor* 788. and the ſame in the Lord *Gray*'s Caſe, and *Scrogg* and *Midwinter*'s Caſe in the Star-Chamber 1636. And the whole Court gave their Opinions, That Judgment ſhould be given for the King. And *Hyde*, *Twyſden* and *Kelynge* held, That the bare Conſpiracy in this Caſe to diminiſh the King's Re-

Information for a Conſpiracy, not ſaying *Vi & Armis*. S. C. 1 Sid. 174. 1 Keb. 650. V. ante 10, 62, 124. Hawk. P. C. 343, 344.

* P. 126

Information for plotting to impoveriſh the Exciſe-Men without any overt-act done.

venue, without any act done, is finable. 27 *Aſſ.* 44. 43 *Aſſ.* 20. *Wyndham* ſaid, That if it was no more than a Conſpiracy without an Act done, it was not puniſhable, but that here was more, *viz.* a Confederacy and a Coadunation, by aſſembling themſelves to this Purpoſe, and he cited 45 *E.* 3. 19. And ſo all agreed, That they ſhould be fined, but not jointly, but ſeparately, according to their Ability, with a *ſalvis contenementis*; and thereupon they fined *Sterling* 1000 Marks, and the others 300 Marks each.

Several Men jointly convicted, fined ſeverally.

* P. 127

* *Morgan* againſt *Man.*

Where the Plea, is No Award, you cannot rejoin, a void Award. S. C. 1 Sid. 180. 1 Keb. 678. 2 Saund. 24, 189. Poſt, 133.

DEBT on an Obligation conditioned to perform an Award. The Defendant pleads no Award; the Plaintiff replies and ſhews an Award, and aſſigns a Breach; the Defendant rejoins, and ſhews another Matter in Controverſy, of which the Arbitrators had Notice, but made no Award thereof; and ſo the Award was void, the Submiſſion being with an *Ita quod.* But by the whole Court, This Rejoinder is a Departure, for no award is none at all, and is not to be maintained by ſhewing the Award to be void; but he ought at firſt to have pleaded the Award, and alſo that other Matter, whereby it was void. And Judgment was given for the Plaintiff, as it was in a like Caſe before, between *Howe* and *Launder*, *Mich.* 14. of this King, in this Court.

Vide ante 85.

Helier againſt *Caſebert.*

The Leſſor brings Debt againſt Adminiſtrators of the Leſſee after an Aſſignment by him. S. C. 1 Sid. 240, 266, 402. 1 Keb. 839, 923. 2 Vent. 209. 1 Saund. 137, to 141, &c. *Ibid.*

DEBT for Rent by the Leſſor, againſt the Adminiſtrator of the Leſſee, who pleads, That before the Rent was due he had aſſigned the Term, whereupon the Plaintiff demurs. And after divers Arguments, it was in *Trinity* Term, 17 *Car.* 2. adjudged for the Plaintiff, by *Twyſden*, *Wyndham* and *Kelynge*, (*Hyde* the Chief Juſtice being then dead) for the Privity of the Contract continued between the Leſſor and the Adminiſtrator of the Leſſee, as it was between the Leſſor and Leſſee themſelves: And this is not contrary to *Overton* and *Syddal*'s Caſe, cited in *Walker*'s Caſe in 3 *Co.* and

Popham's

Popham's Reports; for there the Action was brought by the Succeſſor of the Prebend, againſt the Executor of the Leſſee; and Privity of Contract ſhall not go to the Succeſſor any more than to the Heir, and the Heir of the Leſſor ſhall not maintain Debt againſt the Executor of the Leſſee after Aſſignment, becauſe no Privity of Contract, but only of Eſtate deſcended to him. And here *Wyndham* ſaid, That an Executor cannot waive a Term ſo, but that he ſhall be charged for the Rent if has Aſſets; for he is bound to perform all Contracts of the Leſſor, if he has Aſſets, be the Rent above the Value of the Land or not, which was not denied; and *Kelynge* ſaid, That he cannot ſo waive it, but that he ſhall be charged in the *Detinet*, on which the Aſſets ſhall come in Queſtion: *And if he continues the Poſſeſſion, he ſhall be charged in the *Debet & Detinet* in reſpect of the Perception of the Profits, whether he has Aſſets or not; to which *Twyſden* agreed.

2 Show. 133. 2 Jo. 144. Nelſon's Lutw. 95, 211, 109, 136, 145. Cro. El. 555. Vide 2 Danv. 485. 2 Bac. Abr. 23. 5 Com. Dig. 201. Executor when, and how he may waive a Term. Vide 3 Co. 24. contr. Sed. 2 Vent. 209.

* P. 128

3 Mod. 325, &c. 1 Sid. 266, 342. 3 Lev. 74. 2 Lev. 80. Palm. 116. Poſt, 130, 224. 1 Mod. 185. 2 Danv. 504.

Note, *Michaelmas* Term, 2 *W. & M.* in the Common Pleas, *Rot.* —— there was the like Caſe between *Coghill* and *Fruſton*, as the principal Caſe here, and the like Judgment.

At *Lent-Aſſizes* at *Southwark.*

Earl of *Peterborough* againſt *Sir Thomas Bludworth.*

AN Ejectment was tried before *Bridgman*, Chief Juſtice of the Common Pleas; and on the Evidence the Caſe was, That a Diſſeiſee levied a Fine, and declared the Uſe thereof by Deed to the Conuzee. And *Bridgman* held, That it ſhould not enure to the Uſe of the Diſſeiſor, but if no Uſe had been declared, it ſhould have been to the Uſe of the Diſſeiſor, and extinguiſhed the Right of the Diſſeiſee. And it was intended to have been found ſpecially; but the Jury gave their Verdict at large againſt the Direction of the Court.

A Diſſeiſee levies a Fine, and declares the Uſes thereof.

Termino Paſchæ,

ANNO

16 Car. II. in Banco Regis.

Sanders againſt *Powell.*

Caſe for a malicious Attachment of another's Goods. S. C. 1 Keb. 600. 1 Sid. 183. 1 Salk. 14, 15. 2 Show. 6 Mod. 25, 216, 261.

CASE was brought for that the Plaintiff having among other Things two *duodenas, Anglice* Dozens, of Guns in the Poſſeſſion of *J. S.* the Defendant did falſly and maliciouſly attach them in the Hands of the ſaid *J. S.* as the Goods of *A.* for a Debt due to him by *A.* After Verdict it was moved in Arreſt of Judgment, That the Action did not lie. *Firſt*, Becauſe an Attachment is a legal Suit in a Courſe of Law, for which no Action lies; but all the Penalty is, That he ſhall pay Coſts on a Nonſuit, or Verdict againſt him, if he found he has no Right, *F. N. B.* 49. & 3 *Cro.* 2. *Secondly*, It is not ſaid *Scienter*, nor that the Defendant knew the Goods to be the Plaintiff's. But by the Court, The Action lies, as where the Sheriff levies the Goods of *A.* for the Debt of *B.* though they were among the Goods of *B.* (an Action lies againſt the Sheriff) and the *Scienter* is not material, for the Sheriff is at his Peril to levy the Goods of *B.* only. *Thirdly*, It was objected, That *duodenas* is either no *Latin*, or at moſt is only an adjective Word; and then the Damages are only given for the *Anglice*, which is ill, becauſe all Pleadings ought to be in *Latin*: But by the Court, If there be not any *Latin* Word for a Dozen, then *Duodenas* may be taken for a *Latin* Word made for it, and ſo it is well; and if it be an adjective Word, then no Damages are given for it, nor

Scienter not neceſſary.

For ill *Latin*, or an *Anglice* with an *Engliſh* Word, no Damages. Vide ante 48, 99.

nor for the *Anglice*. And thereupon they gave Judgment for the Plaintiff.

* *Goodwin* againſt *Newton*.

* P. 130

DEBT again an Heir, who pleads he has nothing by Diſcent. After Verdict for the Plaintiff it was moved in Arreſt of Judgment, That the Action is in the *Detinet* only; to which it was anſwered, That it is for the Benefit of the Defendant, and that it may be either in the *Debet* and *Detinet*, or in the *Detinet* only; and cited 10 *H.* 7. 8. But held by the Court to be ill, and not cured by the Verdict: And they gave Judgment, That the Plaintiff ſhould take nothing by his Bill.

Debt againſt the Heir in the *Detinet*. Vide 1 Sid. 342. Poſt, 147, 224. Ante 128.

Winne againſt *Lloyd*.

ERROR of a Judgment in a *Quod ei deforciat* in *Wales*, for that the Tenant vouching, the Warrant of Attorney is Teſted before the Summons *ad Warrantizandum*. Whereto *Jones* anſwered, That the Vouchee may come in before the Summons *ad Warrantizandum* if he will, and make an Attorney, as *Fitz. Voucher* 230. 22 *E.* 3. 7. *Fitz. Voucher* 197, 13 *H.* 7. 24. And it ſhall be intended here, That the Vouchee being preſent in Court, made the Attorney, and ſo the Summons to Warranty, the *Dedimus poteſtatem*, and the Warrant made thereupon, were void: And of this Opinion was the Court, and ſaid, That they would not reverſe a Common Recovery, if by any Means they could make it good; and they affirmed the Recovery.

A Warrant of Attorney teſted before the Summons *ad Warrantizandum*. S. C. 1 Sid. 213. 1 Keb. 54, &c. 748, 809, 914. Vide ante 72. Poſt, 146.

Bowman againſt *Milbanke*.

EJECTMENT and a Special Verdict, where a Man ſeized of Lands in *Newcaſtle upon Tine* (where Lands are deviſable by Parol by the Cuſtom) by a Parol Will deviſes in theſe Words, *I give all to my Mother, all to my Mother:* And whether the Lands paſſed by thoſe Words was the Queſtion: And it was argued by *Glyn* the

A Will wherein he ſays, *I give all to my Mother*, Lands do not paſs thereby. S. C. 1 Sid. 191. Raym. 97. 1 Keb. 719.

2 Danv. 527 16. Vide Bank 236. 6 Mod. 110. Al. 28. 3 Mod. 228. Pott. 212. 2 Vent. 285, 286.

the King's Serjeant for the Plaintiff, who ſaid, That by the Word *all*, it was uncertain whether he intended Lands or Goods: And by *Jones* for the Defendant, who ſaid, That he who gives all excepts nothing; and cited a Caſe, where by the Deviſe of all his Eſtate, all the Eſtate as well real as perſonal * paſſed; and *Bendl.* 6. where a deviſe of all his Livelihood extended to Lands and Goods. But by the Court, *All* is altogether uncertain, and not ſufficient to diſinherit an Heir; and they gave Judgment for the Plaintiff, That the Lands did not paſs by the Will.

* P. 131

1 Mod. 100. 3 Lev. 434. Hob. cited 2 Shower, Caſe 367.

Archer againſt *Bennett.*

Demiſe of a Mill with the Appurtenances, if a Kiln uſed therewith ſhall paſs, Q. S. C. 1 Sid. 211. 3 Keb. 736.

EJECTMENT, and upon Not guilty, a Special Verdict: A man ſeized of a Cloſe, on one Part whereof was a Houſe, and on another Part thereof was a Kiln; and alſo of two Mills adjoining to the Cloſe; and uſed and occupied them all together till 1655, when he divided them, and ſold the Houſe and a Part of the Cloſe, and reſerved the other Part and the Kiln, and uſed them with the Mill (and in Truth the Kiln was a Kiln for the drying of Oats, and the Mills were for the making of Oat-meal, but this was not found by the Verdict.) And afterwards he ſold the Mills *cum pertinentiis* to the Plaintiff: And whether the Kiln, and the Parts of the Cloſe on which they ſtood, ſhould paſs to the Plaintiff, was the Queſtion. And it was held clearly by the Court, That they did not paſs; for by the Grant of a Meſſuage or Lands *cum pertinentiis*, any other Land or Thing cannot paſs, tho' by the Words *cum Terris pertinentibus* it would: And gave Judgment for the Defendant. But by *Wyndham*, Juſtice, if all the Matter had been found, and that the Kiln was neceſſary for the uſe of the Mills, and without which they were not uſeful, the Kiln had paſſed as Part of the Mills, tho' not as Appurtenances. As by the Grant of a Meſſuage, the Conduits and Water-pipes ſhall paſs as Parcel, tho' they are remote; to which no Anſwer was given.

For like Words in a Deviſe. V. Mo. 221. Palm. 376. Cro. El. 16, 89, 704. Cro. Car. 57. Godb. 40, 352. Hut. 85. Lit. Rep. 8. 1 Leon. 34. 3 Leon. 214. Godb 352, 353. 6 Co. 64. 3 Com. Dig. 443.

1 Brown's Ch. Caſ. 331. 2 Bl. Rep. 728. 2 Term. Rep. B. R. 500.

Term,

Term. Sanct. Trin.

ANNO

16 Car. II. in Banco Regis.

Davies againſt *Davies.*

DEBT againſt an Executor who pleads a Judgment, and that he had not any Goods, except ſuch as were not ſufficient to ſatisfy the Judgment; whereto the Plaintiff demurs ſpecially, becauſe not ſhewn of what Value the Goods were which he had. And now *Jones* argued, That it was ill in Subſtance for this on a general Demurrer, as *Treſham*'s Caſe is in 9 *Co.* and if it be no more than Form, as *Moor* and *Andrew*'s Caſe is in *Hob.* 133. yet being ſpecially demurred on, it is ill. And *per Cur'*, it is only Form, as in *Co. Entries* 146, 148, 149, 152, 269, 617. *b.* But being ſpecially demurred on, it is ill.

An Executor pleads a Judgment, and that he had not Goods beſides, except ſuch which were not enough, not ſhewing the Value, 'tis ill. S. C. 1 Sid. 210. 1 Keb. 734. V. Lev. 40, 261, 281. 1 Mod. 165. Poſt, 201, 261, 281.

Hopper againſt *Hackett.*

DEBT on Obligation, conditioned to perform an Award: The Defendant pleads no Award. The Plaintiff replies, and ſets out an Award, which recites, That whereas ſeveral Differences had been between the Plaintiff and Defendant concerning a Houſe and divers Elms, and Arrears of Rent: * They to make a final End of all, did award, That the Defendant ſhould pay to the Plaintiff 4 *l.* for all the ſaid Arrears of Rent. The

An Award recites Differences and Arrears of Rent, and about Trees, and awards 4*l.* for * P. 133 the Arrears of Rent.

S.C. 1 Keb. 738. Vide 1 Salk. 72, 73. 1 Sid. 161. 2 Salk. 72.

The Defendant demurs, for that it is an Award of one Part only, and not of all Differences. But by the Court, the Award being to pay 4*l.* for the Arrears, is mutual therein, for it being for the Arrears, it is in Satisfaction of the Arrears, and they are thereby discharged; and tho' the Award recites other Matters, yet it shall be intended they were otherwise determined, or at least when the Award says to make an End of all Differences, it shall be intended, That the 4*l.* was in Satisfaction of all, the other Matters not appearing but by the Recital of the Award itself; and they gave Judgment for the Plaintiff.

Garrett against *Weeden.*

After no Award pleaded, to say it was not ready to be delivered is a Departure. 3 Keb. 739. Ante 85, 127.

DEBT on an Obligation conditioned to perform an Award: The Defendant pleads no Award. The Plaintiff replies and sets out an Award made, and ready to be delivered to the Defendant, that he should pay to the Plaintiff 5*l.* and assigns the Breach for not paying the 5*l.* The Defendant demurs, because not shewn that it was ready to be delivered to both Parties, but only to the Defendant, and the Condition is, *So that it be ready to be delivered to both Parties.* But by the Court, it shall be intended to be ready to be delivered to the Plaintiff also, and he has brought his Action thereupon; and if it was not ready to be delivered to both, the Defendant ought to have pleaded *no Award*; after which he cannot shew the Award to be void without a Departure: And they gave Judgment for the Plaintiff.

1 Saund. 104. 1 Lev. 309. 2 Saund. 73, 189, 190. 1 Mo. 72. 1 Vent. 101. Raym. 199. Yelv. 38. 1 Gro. 164. 3 Cro. 755.

* P. 134

* *Herbert* and others *Manucaptors* of *Merry* against *Alcocke.*

Judgment in an inferior Court removed into *B. R.* when Execution shall go thereon S. C. 1 Sid. 214. 1 Keb. 758, 735.

JUDGMENT in an inferior Court, being removed into this Court (by Error) and affirmed; it was adjudged, That Execution should issue from this Court, for now it is a Judgment of this Court. But a Judgment in an inferior Court, removed hither by *Certiorari*, shall not be executed here, to make this Court subservient

vient to the inferior Court: But on ſuch Judgment removed hither by *Certiorari*, Debt may be brought in this Court, according to *Hutton's Reports* 117.

Bois againſt *Bois.*

CASE for calling a Widow, who held an Eſtate while ſole and chaſte, *Whore*, falſly and maliciouſly, with Intent to ouſt her of her Eſtate, and ſaying he would ouſt her thereof; and at another Time calling her *Whore*. After Verdict for the Plaintiff on the Iſſue *Not Guilty*, it was moved in Arreſt of Judgment, That no ſpecial Damages being laid, the Words were not actionable: But by the Court, they import Damage in themſelves in this Caſe, in reſpect of her Eſtate; as for calling a Man *Thief*, an Action lies without ſpecial Damage, becauſe the Words import it in themſelves. But for the laſt Words ſpoken at another Time, which are not actionable in themſelves, and the Damages being entire, the Judgment was therefore ſtayed till the Matter be examined, whether the Damages were given entirely or not? For on the back of the Writ where the Damages are entered, there ſeemed to have been ſome Alteration.

Where ſpoken of a Woman who held Lands while ſole and chaſte. S.C. 1 Sid. 214. 1 Keb. 731, 758.

* *Snowe* againſt *Cuttler.*

* P. 135

IN Ejectment tried at Bar, a Special Verdict found, That Huſband and Wife were ſeized of a Copyhold to them and the Heirs of the Huſband; the Huſband ſurrenders to the Uſe of his Will, and deviſes the Lands to the Heirs of the Wife's Body, if they attain the Age of fourteen Years, and dies without Iſſue; ſhe takes a ſecond Huſband, by whom ſhe has Iſſue, but before the Iſſue attains fourteen, the Wife and ſecond Huſband ſuffer a Recovery in the Court of the Manor: And if the Heir of the Wife ſhall have the Land, (the Wife being dead) was the Queſtion, which was argued at the Bar ſeveral Times in this and the following Terms; and divers Points were moved and argued, *viz.* *Firſt*, Whether this Deviſe were good at all, being to a Perſon

A Woman Tenant for Life, her Huſband deviſed to the Heirs of the Wife's Body, if they attain fourteen: ſhe after has Iſſue, but before they are fourteen, ſuffers a Recovery; it is no Remainder, but an executory Deviſe. S.C. 1 Sid. 153. 1 Keb. 567, 752, 800, 851.

Raym. 162, 164. 2 Danv. 517, 2. Vide 2 Lev. 39, 202. 3 Lev. 434. Raym. 38, 413, 162. 2 Jo. 79. 1 Sid. 153. Raym. 83. 2 Mod. 294. Deviſe to an Infant *in Venter*, or when it ſhall be born. Vide Mo. 177, 637. 2 Bulſt. 272, 275. 1 Roll. Rep. 109, 157, 254. 2 Roll. Rep. 355. 1 Roll. Abr. 609. H. 2. Dyer 303. Cart. 5, 87. 2 Mod. 9, 289. 1 Sid. 153. Raym. 83, 162, 413.

Perſon not *in eſſe*? *Secondly*, If it could be good in reſpect of the double Contingency, or a Poſſibility upon a Poſſibility, *viz.* If the Wife ſhould have an Heir of her Body or not? and though ſhe had ſuch Heir of her Body, if it ſhould attain to the Age of fourteen, at the Time of her Death? *Thirdly*, If the Deviſe were good, what Eſtate it ſhould be, *viz.* a Remainder or an Executory Deviſe? *Fourthly*, Whether it ſhould be barred by the Recovery? And the Judges delivered their Opinions in *Mich.* Term 19 *Car.* 2. and then as to the firſt Point, *Wyndham* and *Moreton* held the Deviſe void, as well for want of a Perſon *in eſſe* when the Deviſe was made, as alſo for the double Contingency, *viz.* If the Wife ſhould have any Heir of her Body, and if ſuch Heir ſhould be fourteen at the Time of her Death. And they held, That a Deviſe to an Infant in his Mother's Womb is void, according to *Dyer*, 304. *a.* (But that a Deviſe to an Infant in his Mother's Womb when he ſhall be born, is good) becauſe he is (not) a Perſon capable; and the Statute enables to deviſe to any Perſon or Perſons; and not only on the Words of the Statute, but ſo it was of Lands deviſable at Common Law, by *Paſton* 11 *H.* 6. 13. *b.* But as to this Point *Twyſden* and *Kelynge* then Chief Juſtice held, That a Deviſe to an Infant in his Mother's Womb is good; and that it, and a Deviſe to an Infant in his Mother's Womb, when it ſhall be born, was all one; and they ſaid, That *Hale* Chief Baron was of the ſame Opinion, and told them he had cauſed the Roll of *Dyer*, 304, to be ſearched, and that it * did not warrant that Opinion; and ſo ſaid *Hyde* Chief Juſtice, when the Caſe was argued in *Michaelmas* Term 16 *Car.* 2. *viz.* That he had ſeen the Roll, and he ſeemed to be of *Hale*'s Opinion; and thoſe two Judges, *viz.* *Kelynge* and *Twyſden*, held this Deviſe good notwithſtanding the double Contingency: And as to the third Point, all agreed, That if this Deviſe were good, it muſt be by way of Executory Deviſe, which may well be allowed to take Place within the compaſs of a Life, but not after a dying without Iſſue, for that would make a Perpetuity; and it ſhould not be by way of Remainder; for though the Wife had an Eſtate for Life, yet this is a new Deviſe to take Place after her Death, and is not a Remainder joined to her Eſtate. *Fourthly*, All agreed, That if it was an Executory

* P. 136 Deviſe on a double Contingency, good.

But an Executory Deviſe after a dying without Iſſue, not good. Vid. 2 Saund, 387, 388.

cutory Deviſe, it was not barred by the Recovery as *Pell* and *Brown*'s Caſe in 2 *Cro.* and much more in this Caſe of a Copyhold, the Recovery is no Bar without Cuſtom, and no Cuſtom is found of barring Eſtates by a Common Recovery. But the Court being divided in the principal Point, no Judgment was given, but the Cauſe was agreed to be adjourned into the Exchequer-Chamber. But I ſuppoſe the Parties afterwards agreed, for I heard nothing of it after.

Executory Deviſe not barred by a Common Recovery. Raym. 164. 2 Danv. 192. Court divided.

The *King* againſt the *Church-wardens* of *Axminſter.*

IN an Information for the King, the Caſe was One *Brockhurſt* ringing a Bell in the Church, was ſtrangled with the Rope; And whether the Bell ſhould be a Deodand was the Queſtion on this Information for detaining it from the King; and the Objections againſt the King were two; *Firſt*, That the Bell was fixed to the Freehold: To which it was anſwered, That it was not fixed to the Freehold, but (only) tied in the Steeple, and bound down with Pins or Keys, which might be removed without altering the Freehold. 2*d Objection*, That the Bells are Parcel of the Church Goods, and it would be in vain to forfeit it to the King, to be by him given back to the Church again, *viz.* to pious Uſes: To which it was ſaid, That it ſhould be forfeited as a Satisfaction for Blood, to be diſpoſed by the King to other pious Uſes. *Hyde* Chief Juſtice, and *Wyndham* were of Opinion, That the Bell was not forfeited; the other two ſeemed contrary: But nothing further was done in the Caſe, that I could hear of.

A Man hang'd by the Bell-rope. Q. If the Bells are Deodands. S. C. Raym. 97. 1 Sid 204, 205. 1 Keb. 123, 744.

* *Atherton* againſt *Hole.*

* P. 137

THE Bail in inferior Court before any Judgment given againſt them there, but after Judgment againſt the Principal there, brought Error of the Judgment againſt the Principal and himſelf, in which are the uſual Words, *If Judgment be thereupon given*; and ſuppoſe the Error, *as well in giving the Judgment, as in adjudging of the Execution*, and the Writ was quaſhed, becauſe

Bail cannot bring Error of a Judgment againſt the Principal and himſelf, nor can they join in Error. Q. 1 Sid. 216. 3 Term. Rep. 79.

cauſe the Bail cannot bring Error of the principal Judgment, nor can the Principal and the Bail join in Error. But whether the Record was removed thereby was the Queſtion; and that it was removed: *Pollexfen* cited 1 *Cro. Smith* againſt *James* where Principal and Bail join, which was therefore quaſhed, and yet the Record was removed. But *Twyſden* Juſtice, cited *Hill.* 21 *Car.* 1. *B. R. Rot.* 217. That by a Writ of Error brought by the Bail, the Judgment againſt him only can be removed, and here no Judgment being againſt him, nothing is removed; for Judgment againſt him is not yet given. But it was adjourned.

Price againſt *Hill.*

Aſſumpſit in an inferior Court on a Promiſe within the Juriſdiction for Goods ſold, and not ſaying ſold within, &c. 8. C. 1 Keb. 760. 1 Saund. 74. Vide Ante 50, 243. 1 Mod. 32.

ERROR of a Judgment in *Wallingford* Court, where the Plaintiff declared, That the Defendant being indebted to him at *Wallingford*, for Goods to him ſold and delivered, promiſed at *Wallingford*, (to pay) &c. and becauſe he does not ſhew where the Goods were ſold and delivered, and ſo it may be without the Juriſdiction, therefore the Judgment was reverſed. 69, 96, 104. poſt, 156, 153, 208. 1 Sid. 259. 2 Lev. 87. 1 Vent. 2, 72. 2 Mod. 141. 2 Danv. 301, 10. 2 Show. Caſe 430.

* P. 138

* *Slader* againſt *Smalbrooke.*

Proſecution in the Spiritual Court for forging Eccleſiaſtical Orders, not prohibited. 8. C. 1 Sid. 217. 1 Keb. 721, 962.

PROHIBITION, a Layman forges Orders, and obtains a Benefice, for which he is proſecuted in the Eccleſiaſtical Court, in Order to Deprivation, and he prays a Prohibition, becauſe Forgery is triable at Common Law; but the Prohibition was denied, for the Forgery is touching an Eccleſiaſtical Matter, and he is ſuable there for it in order to his Deprivation only.

Term.

Term. Sanct. Mich.

ANNO

16 Car. II. in Banco Regis.

The *King* againſt *Summers* and *Summers*.

ERROR of a Judgment on an Indictment for reciting a libellous Letter ſcandalous to *Melliſh*, to a Woman whom he intended to marry, before the Juſtices of Peace at *Guild-hall*. And the Errors aſſigned were; *1ſt*. That it was only a private Letter, and not puniſhable by Indictment. *2dly*. If it were, yet not before Juſtices of Peace, but Commiſſioners of *Oyer* and *Terminer*, who have theſe Words in their Commiſſion, *de propalationibus verborum*. And for both Cauſes, *Hyde*, Chief Juſtice, at firſt held it to be erroneous. But in *Trinity* Term following, *Hyde* being dead, *Twyſden*, *Kelynge*, and *Wyndham* held it indictable, becauſe it tended to a Breach of the Peace, and before Juſtices of Peace, as well as before Juſtices of *Oyer* and *Terminer*.

A Scandalous Letter indictable before Juſtices of the Peace as a Libel.
S. C. 1 Sid. 270.
1 Keb. 772, 788, 931.

Bean againſt *Newbury*.

DEBT upon an Obligation conditioned, That whereas the Defendant by himſelf and his Son, had ſubmitted to the Award of *A*. and *B*. to perform it, ſo that the Award be ready, *&c*. before the firſt of *May*, and if they made none, to the Award of ſuch an Umpire as they ſhould chuſe, to be made the 1ſt of *June*;

A. and *B*. of one Part, and *C*. of the other Part, ſubmit, and the Award is between *B*. and *C*. only: it is void.

1 Keb. 790, 832, 857.

June: The Defendant pleads no Award nor Umpirage; the Plaintiff confeſſes no Award by the Arbitrators, but (ſays) That the Umpire awarded the Plaintiff to ſeal to the Defendant three Obligations, and the Defendant to pay to the Plaintiff 100 *l.* which he had not done. The Defendant demurs, * and the Award was adjudged void for two Cauſes; 1*ſt.* For that nothing is awarded as to the Son, and it ought to be to every one for ſome Part, or elſe it is void in the whole. 2*dly.* Altho' the *ita quod* be in the Clauſe referring to Arbitrators, and the Award is made by the Umpire, yet the *ita quod* by Conſtruction ſhall relate as well to the Umpire as to the Arbitrators, and for this was cited by the Counſel 2 *Cro.* 278. 3 *Cro.* 838. but of this the Court for ſome time differed in Opinion, but at length all agreed as aforeſaid. Then the Plaintiff ſeeing the Opinion of the Court againſt him, prayed leave to diſcontinue, which was denied; for tho' they permit Diſcontinuances in Caſe of Obligations for Payment of Money, yet never in Caſe of Obligations for Performance of Awards, except upon extraordinary Occaſions.

* P. 140

Ita quod, &c. In the Clauſe of the Arbitrators only ſhall yet relate to the Umpire alſo.

Diſcontinuance denied.

Coleman and his *Wife* againſt *Harcourt.*

Huſband and Wife cannot join in an Action for ſaying, *Thou keepeſt a Bawdy-Houſe.* Ante 3. Hard. 166.

CASE for ſaying to the Wife, they keeping a Victualling-houſe, *Thou art a Bawd to thy own Daughter,* whereby *J. S.* that uſed to come to the Houſe forbore, *&c.* to the Damage of both. After Verdict for the Plaintiff, Judgment was ſtaid, becauſe the Words are not actionable, except in reſpect of the ſpecial Loſs, which is the Huſband's only.

Keyme againſt *Goulſton.*

Put your Daughter to School and I will pay for her for a Year. He puts her to School a quarter of the year. Action lies. S. C. 1 Sid. 225. 1 Keb. 792.

ASSUMPSIT, in Conſideration *the Plaintiff would put out the Plaintiff's Daughter's Daughter to a School-miſtreſs, he the Defendant would pay for her Board for a Year.* And that he put out his Daughter for three Quarters of a Year, which came to 10*l.* and that the Defendant had not paid: After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Conſideration

ſideration is not performed, for when he promiſed to pay for a Year, it ought to be intended, That he ſhould put her out to School for a Year, otherwiſe the Plaintiff might put her out for a Week only, and yet oblige the Plaintiff to pay for a Year. But by *Twyſden* and *Wyndham*, it may be intended, *Put her there to School, and I will pay for a Year, ſtay ſhe more or leſs*; and by *Hyde*, Chief Juſtice, it may be intended, *Set her to School, and I will pay for a Year or leſs, according to the Rate ſhe ſtays.* And thereupon by all the Three, Judgment was given for the Plaintiff. * P. 141

Wright againſt *Beal.*

ASSUMPSIT, That where the Defendant was indebted to him for ſuch Tithes ariſing from the Vicarage of *Dale*; he the Defendant promiſed to pay, *&c.* After Verdict on *Non Aſſumpſit*, it was moved in Arreſt of Judgment, 1*ſt*. That Tithes are in the Realty of which an *Aſſumpſit* does not lie no more than for a Rent. 2*dly*. That the Vicar is to have and not to pay Tithes. 3*dly*. It is not ſaid, ſold and delivered to him. But anſwered by the Court, as to the 1*ſt*. It may be intended Tithes ſevered. To the 2*d*. An Abbot or other Perſon might have had a Portion of Tithes out of a Vicarage, which is now come to the Plaintiff. 3*dly*. The *Indebitatus* implies ſold and delivered, otherwiſe he could not be indebted; and they gave Judgment for the Plaintiff.

Indeb' Aſſumpſ for Goods, implies ſold and delivered. S.C. 1 Sid. 225. 1 Keb. 781, 783, 792, 823.

A Vicar may pay Tithes.

Hill againſt *Ellard.*

REPLEVIN of a Cow. The Defendant avows Damage feaſant: The Plaintiff pleads in Bar to the Action, and preſcribes for four Cows and half a Cow, Iſſue on the Preſcription and Verdict for the Plaintiff. It was moved in Arreſt of Judgment, That the Iſſue is ſenſeleſs and void; for one cannot have Common for four Cows and an half. But by *Wyndham* and *Twyſden*, the reſt being abſent, if in Replevin ſo much of the Preſcription be found as will ſerve the Turn of the

Preſcription for Common for 4 Cows and a half. So much of the Preſcription as is enough to juſtify, is good, tho' the whole Preſcription is not found. S. C. 1 Sid. 226. 1 Keb. 793.

the Party, tho' the whole be not found, it is ſufficient. And here the Action is for one Cow only, and the Preſcription as to the four is a good Juſtification of putting in one Cow: And they gave Judgment for the Plaintiff.

* P. 142

* *Elrington* againſt *Doſhant.*

Not guilty pleaded in *Aſſumpſit.* 1 Stra. 574. 2 Stra. 1022. Bull. N. P. 151.

IN *Aſſumpſit* the Defendant pleads Not guilty, Iſſue thereon and Verdict, that he was Guilty, and that he aſſumed in Manner and Form as declared. It was moved in Arreſt, That Not guilty is no Iſſue in this Caſe, and the finding farther that he aſſumed, is void, not being in Iſſue. But held by *Wyndham* and *Twyſden* only in Court, That it was cured by the Verdict at leaſt; and by *Wyndham*, Not guilty is a good Plea and Iſſue in *Aſſumpſit*, for it is Treſpaſs on the Caſe; and they gave Judgment for the Plaintiff.

Reby againſt *Robinſon.*

Vouchee alone brings Error without the Tenant. S. C. 1 Keb. 141, 880, &c. 2 Saund. 95. 1 Sid. 321. Infant ſuffers a Recovery in Perſon, and being of Age, aſſigns the Infancy for Error. V. 1 Sid. 321, 446, 467. 1 Mod. 48, 49. Hob. 196. Godb. 161. Cro. El. 323. Cro. Car. 307. 2 Saund. 94, 95.

ERROR of a Common Recovery ſuffered by an Infant in Perſon as Vouchee, he being now of Age: And two Queſtions were argued, 1*ſt.* Whether the Vouchee alone might have Error without the Tenant; for that the principal Judgment is to be reverſed, and the Judgment againſt the Vouchee is but as a Conſequent thereof. 2*dly.* Whether the Infant might aſſign it for Error, he being now of Age, ſo that it cannot be tried by Inſpection, as in the Caſe of one within Age, and it not being done by Attorney, it cannot be tried by Jury, as in Judgments where he appears by Attorney (it may.) And the Caſe was often argued, but at laſt the Parties agreed before any Judgment given. But *Jones* told me, he heard the Judges were of Opinion againſt the Plaintiff in Error upon the ſecond Point.

1 Roll. abr. 731. G. 751. Pl. 18. 1 Jon. 318. Hetl. 171. Q. 10 Co. 43. 5. 1 Com. Dig. 233. 5 Bac. Abr. 222. 3 Bl. Com. 334. Shep. Touch. 7. Piggot on Rec. 64. Cruiſe on Rec. 148. 2 Term. Rep. 159.

Bevan

* *Beven* againſt *Clapham.* * P. 143

ASSUMPSIT, That where the Defendant at the Pariſh of *Bow*, in the Ward of *Cheap*, *London*, was indebted to him, he promiſed to pay, *&c.* The Defendant pleads he did not promiſe within ſix Years: The Plaintiff replies, That the Debt was contracted at *Tenerif* beyond Sea, *viz.* in the Pariſh and Ward aforeſaid; and that within ſix Years after his Return he brought the Action: The Defendant demurs. *Firſt*, For that the Replication is a Departure from the Declaration, which lays the *Indebitatus* at *Bow* in *London*; and the Replication is at *Tenerif* beyond Sea. But by the Court, it is well enough, it alſo ſaying in the Pariſh and Ward aforeſaid. *Secondly*, This Caſe is not within the Action, which ſaves the Statute till the Defendant returns; but here it is founded on the Return of the Plaintiff, which is not mentioned in the Statute. But by the Court, it is within the Reaſon and Intent of the Statute: And they gave Judgment for the Plaintiff.

Statute of Limitations no Bar where the Plaintiff goes beyond Sea. 8. C. 1 Sid. 228. 1 Keb. 799. Vide 1 Sid. 702. Vide Stat. 4 & 5 *Anne*. c. 16. Sect. 18, 19. 1 Lutw. 946, 947. Nelſon's Lutw. 300. 8 Mod. 311. 2 Salk. 420.

Aſſumpſit at *London*, Replication at *Tenerif*, *apud London*, well. See 6 Mod. 194, 228.

Ellis againſt *Jackſon.*

TRESPASS for Battery and Impriſonment; the Defendant juſtifies by Execution of a Writ, but on the Plea it appeared to be executed after the Return, but before the *quarto die poſt*: And the Execution was adjudged to be illegal. *Moor* 733. 3 *Cro.* 180. 23 *H.* 6. 45. *b.* were cited; and Judgment was given for the Plaintiff. And Juſtice *Wyndham* cited a Caſe, where the Writ by the Roll was awarded to be returned on a *Wedneſday*, but it was made returnable on the *Thurſday*, and executed on the *Thurſday*; and the Writ was ordered to be amended according to the Roll, and the Execution on the *Thurſday* made void.

A Writ executed before the *Quarto Die* after the Return is ill. S. C. 1 Sid. 228. 1 Keb. 718, 805. See 6 Mod. 270, to 286. 2 Salk. 512.

* *Burman* againſt *Aſton.* * P. 144

COVENANT againſt the Defendant, as Executor to *Eltonhead*, who covenanted in a Leaſe made by him to the Plaintiff, of certain Gravel Pits in *Black-Acre*,

A. being Tenant of *B.* (who holds of *C.*) is Undertenant of *C.*

S. C. 1 Keb. 775, 806.

That he, his Heirs, Aſſignees, or Under-tenants, would not dig or ſell any Gravel there; and aſſigns a Breach, That *Brent*, an Under-tenant to *Elton-head*, did dig and ſell Gravel in other Pits in *Black-Acre*. Iſſue that *Brent* was not Under-tenant to *Eltonhead*; the Jury found, That *Brent* held the other Pits in which, &c. by Leaſe from one *J. S.* who held them of *Hunt*, who held them of *Eltonhead*; and it was objected: *Firſt*, That *Brent* was not Under-tenant to *Eltonhead*, for *Brent* had not the whole Term granted by *Eltonhead* to *Hunt*, nor could *Eltonhead* maintain Debt againſt him for want of Privity: But it was adjudged that he was Under-tenant mediately to *Eltonhead*, for he claims under him, though not immediately. *Secondly* objected, That the Covenant extends only to the Pits demiſed, and not to other Pits. But by the Court, It ought to be intended of all the other Pits in the Cloſe, and not only of the Pits demiſed to the Plaintiff, for in them *Eltonhead* had nothing to do before the Term (ended.) And Judgment was given for the Plaintiff.

Smith againſt *Farnaby*. In the Common Pleas.

Remainder of a new Rent, good. S. C. 1 Sid. 285. 2 Keb. 89. Carter 52. Nelſon's Lutw. 386. Vide 1 Mod. 218. 6 Mod. 112. 2 Salk. 577, 578. 2 Lutw. 1224, &c. 2 Lev. 80, 88.

A RENT *de novo* was deviſed to one for Life, Remainder to another in Tail; he in Remainder ſuffered a Common Recovery, and adjudged in the Common Pleas, that it was a good Rent and Remainder, and not an Executory Deviſe of the Rent after the Death of the Deviſee for Life, and that it was barred by the Common Recovery. This I had by Report from *Roger Moore*, then a Student, afterwards Serjeant at Law: And *Note*, This Judgment was afterwards affirmed on a Writ of Error *in B. R.* in *Eaſter* Term 18 *Car.* 2. which ſee in 1 *Sid.* 285. But it is there put, That the firſt Deviſe was in Tail, the Remainder in Fee; and adjudged that the Remainder of the new Rent was good.

* P. 145

* *Maſon* againſt *Tredway*.

Tenant for Years releaſes to him in the Reverſion.

TENANT for Years remiſes, releaſes, diſcharges, and for ever quit-claims to him in Reverſion: And whether it was a good Releaſe or Surrender of the Term, was

was the Queſtion: And it was argued by *Raymond*, That it was in the Caſe of a Leſſee for Years, though it would not be ſo in the Caſe of a Tenant for Life. *Co. Litt.* 275. *b.* 276 *a.* 2 *Cro.* 160. Tenant for Life releaſes to him in Reverſion, it is void by way of Releaſe, and not good by way of Surrender for want of apt Words: But in the Caſe of a Leaſe for Years, conſiſting only in Contract, it may be extinct by the Word *Diſcharge*, which ſhews his Intent not to have any Thing further to do with the Land, and therefore it ſhall be a Surrender. 3 *Cro.* 21. *Perkins*, *Sect.* 607. And the Court inclined, That it was a good Surrender. And *Wyndham* Juſtice, cited a Caſe, where a Leſſee for Years remiſed and releaſed to his Leſſor; and it was adjudged a Surrender, for that the Leaſe for Years ſtood only in Point of Contract. But it was adjourned.

S. C. 1 Keb. 807.
5 Com. Dig. 409, 630.
3 Bac. Abr. 457.
Gilb. Ten. 301.
1 Burr. 78, 80.
Cowp. 599.
Doug. 139.

Brookes againſt *Dean*.

DEBT on an Obligation, conditioned to deliver Goods upon ſuch a Day: The Defendant pleads that he delivered them according to the Form of the Condition aforeſaid. Whereupon the Plaintiff demurs, for that he ought to have pleaded expreſsly according to the Words in the Condition, That he delivered the Goods upon the ſaid Day, and not generally, as here; and the Court ſeemed of the ſame Opinion: But it was adjourned.

Condition to deliver Goods ſuch a Day. Plea, a Delivery according to the Condition is not good.
Q. 1 Keb. 678.
2 Mod. 269.
1 Lutw. 546.
Nelſon's Lutw. 168, 178.

* Mr. *Bacon*'s Caſe. * P. 146

HE was indicted for intending to murder the Maſter of the Rolls, and for offering 100*l.* to *J. S.* to do it; and ſaying, That if he would not, he would do it himſelf; and he being convicted, it was moved, That this Intent only was not indictable: But the Court to the contrary ſaid, Anciently the Will was reputed or taken for the Deed, in Matters of Felony; and tho' it is not ſo now, yet it is an Offence and finable; and they fined him 1000 Marks, 3 Months Impriſonment, and to find Sureties of Good Behaviour during Life.

An Intent to commit Felony is finable.
S. C. 230.
1 Keb. 804, 809.

A Criminal pleads by Attorney.
6 Mod. 40.
1 Salk. 86, 88.

A Priſoner at the King's Suit not chargeable with other Actions. Ante 125.

Note, He pleaded by Attorney, which the Court ſaid he might do by the Favour of the Court, though not by ſtrictneſs of Law: But the Court being moved to charge him in Priſon with other Actions, they would not permit it.

Winne againſt *Lloyd.*

No Coſts in Error, where none in the original Action. Strange 139, 262, 617, 834, 977, 1072, 1084. 1 Bac. Abr. 524. S. C. 1 Sid. 213. Raym. 16, 55, 70, 96, &c. Vide ante 72, 130.

ERROR of a Judgment given for the Plaintiff at the Grand Seſſions in *Wales*, and the Judgment affirmed (as before 72, 130.) And now it was moved, That the Demandant in the former Action, (being the Defendant in Error) might have Coſts on the Statute 3 *H.* 7. becauſe the Writ of Error was ſued in delay of Execution. But by the Court, No Coſts ſhall be given on the Writ of Error, becauſe no Coſts or Damages in the original Action, according to 1 *Cro. Smithe* againſt *Smithe*, *Mich.* 11 *Car.* 1.

But *Note*, In 3 *Cro.* 616, 617. *Graves* againſt *Short*, entered *Hill.* 40 *Eliz. Rot.* 847. Coſts were given in Error upon a *Formedon*, and in the ſame Book, 659. *Penruddock's* Caſe, and 5 *Co.* 101. in Error of a Judgment in a *Quod permittat*, 41 *Eliz.* Coſts were given in the Writ of Error, though none were in the original Action.

* P. 147

* *Corey* againſt *Thinne.*

When an Executor ſhall be charged in the *debet* and *detinet* on a *Devaſtavit* or not. S. C. 1 Sid. 102. 1 Saund. 219. Vide 6 Mod. 125. N. Lut. 209, 210. 2 Lev. 40, 110, 133, 145, 189, 209. 1 Vent. 321. contra.

ERROR of a Judgment in Debt given in the Common Pleas, entered in *Eaſter* Term 1655. *Rot.* 844. where the Plaintiff declared in the *debet* and *detinet* againſt an Executor, and of a *Devaſtavit*, and had Judgment of the Executor's own Goods, and the Judgment was affirmed in *B. R.* And in *Eaſter* Term 15 *Car.* 2. *B. R. Rot.* 546. was the like Caſe and the like Judgment, in Debt on a Judgment, where the Plaintiff recovered, and the Defendant paid the Money; and ſo in *Michaelmas* Term, 20 *Car.* 2. *B. R. Rot.* 740. a like Caſe was in Debt on a Judgment by *Wheatly* againſt *Lane*, and the like Judgment. But in the Caſe of *Ent* againſt

againſt *Withers*, *Mich.* 29 *Car.* 2. *B. R.* in Debt on an Obligation, the Count was *Devaſtavit* againſt an Executor in the *debet* and *detinet*, and it was ruled by Judgment for the Defendant, for the Court would not allow the Action to go further than it had been before, *viz.* than in Debt on a Judgment; and ſo held the Court formerly in the Time of *Hale*, in the Caſe of one *Horſey* and *Daniel*.

2 Show. 55, 59. 1 Saund. 216, 219, 307, 308. 1 Sid. 333, 397. 1 Rol. Ab. 919, 931. 2 Lut. 670, &c. Poſt, 245, 255, 256.

Rutter againſt *Hebden*.

ASSUMPSIT in Conſideration that ſhe would marry him he would marry her. After Verdict for the Plaintiff, it was moved, That it was a Matter Eccleſiaſtical on which no Action would lie. But the Court would not permit it to be argued, but gave Judgment for the Plaintiff, ſee 7 *H.* 6. 1. Deceipt brought for not marrying his Daughter according to the Agreement; and held well, for the Contract is temporal.

Aſſumpſit to marry a Woman. S. C. 1 Sid. 180. 1 Keb. 252.

V. 1 Salk. 24, 5 Mod. 411. 6 Mod. 172.

* *Anonymus*.

* P. 148

A *Mandamus* to reſtore a Jurate of *Maidſtone*; they return their Incorporation, with Power to elect Jurates for their Lives, if they think it expedient; and that they elected him, and afterwards it ſeemed expedient to them to diſplace him; wherefore they accordingly did ſo; and the Return was adjudged inſufficient, for tho' they had Power to elect for Life, if it ſeemed expedient to them, yet they had no Power to diſplace or put him out of it, if it ſeemed expedient to them.

A Power is to elect a Jurate for Life, if they think fit; he is not removeable at Pleaſure.

Proby againſt the *Marquis* of *Dorcheſter*.

ERROR of a Judgment in the Common Pleas in *Scandalum Magnatum*, for ſaying, *I value my Lord Marquis of* Dorcheſter *no more than I value the Dog at my Foot:* And the Errors aſſigned were, 1*ſt*. That the Words are not actionable within the Statute, for they do

Scand' Mag' for ſaying, *I value him no more than a Dog.* S. C. 1 Sid. 233, 1 Keb. 813. 1 Com. Dig. 190. 8tra. 618.

do not import any ill Action done, or Words ſpoken by him (*i. e.* the Marquis) but only ſhews the Eſteem or Value the Defendant had for him. 2*dly*. The Declaration is, That he ſaid *theſe falſe and opprobrious Words of him*, and does not ſay, *Lies*, or *falſe News or Tales*, as the Statute ſpeaks. 3*dly*. The Judgment is *in Miſericordia*, where it ought to be a *Capiatur*, the Suit being as well for the King as for himſelf. But as to this laſt, the Court thought it ſufficient, but they ſpoke nothing as to the two former, only adjourned it to be further argued. But afterwards before it came to be argued again, *Proby* was killed, and it was ſaid, That the Judgment paſſed without Debate in the Common Pleas. But the Executors, after *Proby*'s Death, paid the Money, as the Marquis himſelf told me.

Lies, &c. omitted. Judgment in *Miſericordia*.

* P. 149

* *Cornhill*'s Caſe.

Error lies in *B. R.* on a Judgment in Criminal Caſes in the ſame Court of Errors in Fact or in Law, and in civil Caſes in F. & only. S. C. 1 Sid. 208. Q. 721.

ERROR of a Judgment given here on an Indictment in *London*, againſt him for ſeducing him into an ill Houſe, and there cheating him of 30*l*. removed hither by *Certiorari*; and it was objected, That the Writ lay not here upon a Judgment given by themſelves, and cited *Read* and *Dawſon*'s Caſe about two Years before, where the Writ of Error on a Judgment in an Indictment of Perjury in this Court was brought in Parliament: The Court ſaid, That proves that it may be brought in Parliament, not that it muſt; and they affirmed their Juriſdiction, That Error may be brought in this Court in Caſes Criminal on Judgments given in the ſame Court: But not in Caſes Civil, except it be of Errors in Fact triable by Jury. But in Caſes Criminal, as well of Errors in Law as in Fact. And it was ſaid by *Twyſden* and *Wyndham*, and not denied, that Error lies here of an Attainder before the Lord High Steward: But the Plaintiff in Error ought to aſſign his Errors in Perſon.

Error in *B. R.* of a Judgment before the Lord High Steward.

Collins

Collins againſt *Sutton.*

DEBT on an Obligation at *London*, conditioned, That if ſuch a Ship did not miſcarry in ſuch a Voyage, to pay, *&c.* The Defendant pleads, That the Ship miſcarried at *Falmouth* in *Cornwal*. The Plaintiff demurs, and Judgment for him, for all this Matter is tranſitory, and the Plaintiff hath Election to bring his Action in which County he pleaſes, and the Defendant is obliged to plead to all tranſitory Matters, as this is, in the ſame County; for whether the Ship periſhed in the one County or the other, it is all one: But if he had local Matter to plead, he may plead it in the County where ſuch local Matter aroſe, and thereby bring the Plaintiff to try it in another County, otherwiſe not, as 9 *E.* 4. 46. and *Hill.* 1655. *Rot.* 864. between *Lenois* and *Williams*.

The Plaintiff lays tranſitory Matter in one County, the Defendant cannot by Plea carry it to another County, S. C. 1 Sid. 234. 1 Keb. 816.

* *Jaſon* againſt *Morgan.*

* P. 150

A JUDGMENT was obtained forty Years before, and no Warrant of Attorney to acknowledge Satisfaction entered, till within theſe two Years, and the Entry was, *He acknowledged himſelf about to be ſatisfied*, inſtead of, *he was ſatisfied*; and the Warrant being good, it was reſolved to be amended, being only the Fault of the Clerk, and it was done accordingly.

Warrant of Attorney amended.

Jenkins againſt *Keymis* in the Exchequer.

EJECTMENT tried at Bar, and a Special Verdict, *viz.* Sir *Nicholas Keymis* Tenant for Life, and Remainder to his Son *Charles* in Tail general, with a Remainder over, they on the Marriage of *Charles* with *Blanch* his firſt Wife, and in Conſideration of the Marriage, and 2500*l.* Marriage-Portion, levy a Fine and ſuffer a Recovery to the Uſe of Sir *Nicholas* for Life, Remainder to *Charles* and the Heirs of his Body on *Blanch* begotten, the Remainder to the Heirs of the Body

Conſideration of a former Marriage extended to the ſecond. S. C. Hard. 395. Poſt, 237, 238.

Body of *Charles*, Remainder over, with Power for Sir *Nicholas* by Deed in Writing, to charge all and ſingular the Premiſes with the Payment of 2000*l.* After which, Sir *Nicholas* and *Charles* without recital of the Power, by Leaſe and Releaſe for 2000*l.* convey part to *David Jenkins* and his Heirs, on Condition to be void on the Payment of 160*l.* at the End of the firſt Year, and 160*l.* yearly for nine Years after (being the Intereſt) with the ſaid 2000*l.* or of 2000*l.* and Intereſt at the End of any Year after the firſt Year: Sir *Nicholas* dies, *Blanch* dies, Sir *Charles* marries a ſecond Wife, by whom he had Iſſue the Defendant, and dies; and the Money not being paid, the Leſſor, Son and Heir of *David Jenkins*, brought Ejectment. And two Points were argued at the Bar by *Levinz* for the Plaintiff and *Stephens* for the Defendant, *viz.* 1*ſt.* If the Conveyance by the Leaſe and Releaſe be a good Execution of the Power? 2*dly.* If not, then whether the Settlement be not voluntary and void againſt *Jenkins* the Purchaſer for 2000*l.*? And as to the firſt, it was ſaid and agreed by the Counſel, That the Leaſe and Releaſe was a good Execution of the Power as to the Form, tho' that the Power is to charge by Deed in the Singular Number, and this is done by two Deeds. For * a Condition to make a Feoffment is well ſatisfied by a Leaſe and Releaſe. *Secondly*, It was ſaid and agreed, That notwithſtanding the Power be not recited, it may be a good Execution of the Power, as 6 *Co. Cleer's* Caſe. And alſo it may be good notwithſtanding *Charles* joined in the Conveyance, and though it be only of Part of the Lands: But the principal Matter in this Point was, If this Conveyance of a Fee, redeemable on the Payment, not only of 2000*l.* but alſo Intereſt for a Year certain, and alſo for more Years if not paid at the End of the firſt Year, be good; or if it be not good for the Intereſt, it be good for the 2000*l.*? For it was ſaid, That when a Man performs his whole Power and more, it ſhall be good for that which is within his Power, and void for the Reſidue. But as to this Point *Hale* and the Court held, That it was not an Execution of the Power, for by this Means he might charge all the Eſtates with a great Sum of Money, which would defeat the whole Settlement; and the Power is intire, and ſo is the Execution, and cannot be made good for Part, and void for the Reſidue at Law: But *Hale* ſaid, That perhaps there might be Reaſon in Equity to

Power to charge Lands with 2000*l.* how to be executed. Powell on Powers 316.

* P. 151

to aid the Execution, as to the 2000*l.* And he ſaid alſo, That the Power might have been better executed by a Grant of the Debt, till 2000*l.* were levied of the Profits, or by Declaration of a Uſe till 2000*l.* were received, or by a Deed charging the Land with the Payment of 2000*l.* But he doubted, That it could not be good by Feoffment, or by Leaſe and Releaſe of the Inheritance, till 2000*l.* and Intereſt were paid: And as to the ſecond Point it was ſaid, That the Settlement was meerly voluntary as to the Iſſue by the ſecond Wife; for the Marriage of the firſt, and the Portion paid with her could not extend to the Iſſue by the ſecond Wife; nor could it be ſuppoſed that any Thing was given for it; for the Eſtate as to the Iſſue by the ſecond Wife, is no more than he had before; for the Remainder before the Marriage-Settlement with *Blanch*, was to *Charles*, and the Heirs of his Body, which extends to the Defendant without the Settlement, and therefore it cannot be intended that the Marriage-Portion was paid for that which *Charles* had before; and then the Settlement being voluntary, and the Conveyance to *Jenkins*, made by *Charles* as well as Sir *Nicholas*; and the Settlement being with a *Proviſo* to charge the Lands with the Payment of 2000*l.* it is void againſt *Jenkins*, a Purchaſer for a valuable Conſideration within the Proviſion of the Statute 27 *Eliz. c.* 4. which makes Conveyances with Power to revoke, alter, or determine at their Will and Pleaſure, void: But as to this the Court held, That this Proviſo for charging with 2000*l.* is not a Power within the Words of the Statute, (it being a particular Sum) to revoke, determine or alter the Eſtate; and no Fraud being found, they could not adjudge the Conſideration of the Marriage and Portion, might extend to all the Eſtates in the Settlement. And they gave Judgment for the Defendant.

* P. 154 *Note*, This Cauſe was heard in Chancery, *Paſch.* 20 *Car.* 2. before *Bridgman*, who held, That the Marriage and Portion of the firſt Wife extended to the Iſſue by the ſecond; and that Sir *Charles* joining with Sir *Nicholas* in the Conveyance to *Jenkins*, and not reciting the

And *Note*, That *Jenkins* afterwards brought his Bill in Chancery to have the Defect of the Execution of the Power ſupplied there, but could not have any Relief.

Power, it could not be intended to be done in Execution of the Power, but as Owners, and therefore denied Relief; although there was a Covenant for further Aſſurance, which Sir *Charles* might have made by Recovery, but he not having done it, his Iſſue ſhall not be compelled to do it. Vide poſt, 238, 239.

Johnſon

Johnſon againſt *Carre.*

A Covenant in the ſame Deed, how pleadable in Bar. 1 Danv. 722.

DEBT for Rent on a Leaſe for Years, the Defendant pleads in Bar a Covenant by the Leſſor, that the Leſſee might deduct ſo much for Charges: And upon Demurrer it was adjudged, That the Covenant being in the ſame Deed, is well pleadable in Bar, the Thing being Executory; and the Party ſhall not be put to a Circuity of Action, *viz.* to bring an Action on the Covenant.

P. 153

* Term. Sanct. Hill,

ANNO

16 & 17 Car. II. in Banco Regis.

Adams againſt *Tomlins.*

Debt *in B. R.* on a Judgment there, after Error brought thereof in Cam. Scacc. S. C. Raym. 100. 1 Vent. 34. 3 Lev. 396. 1 Sid. 236. 1 Mod. 121. 1 Keb. 827.

IN Treſpaſs 300*l.* Damages were recovered, and Judgment thereon; and Error brought thereof in the Exchequer Chamber; pending which the Plaintiff brought an Action of Debt in this Court for the 300*l.* And by all the Judges, except *Kelynge*, it well lies, for the Record itſelf is yet in this Court, and the Writ of Error is a *Superſedeas* of the Execution only. See 4 *H.* 6. 31.

Vide 1 Sid. 236. 253. 2 Mod. 194. Raym. 100. 5 Mod. 68. Q. Palm. 187, 303. 2 Cro. 645. 1 Cro. 575. Sid's Practice 130.

Corven

Corven or *Corbet* againſt *Pierſon.*

ERROR of a Judgment given in *Exeter* Court in Caſe, for that he being an Officer of the Cuſtom-Houſe for the Port of *Exeter*, the Defendant falſly and maliciouſly at *Exeter*, within the Juriſdiction of the Court, informed the Commiſſioners of the Cuſtoms there, that he took Bribes, whereby he loſt his Office. After Verdict and Judgment for the Plaintiff in *Exeter* Court, it was aſſigned here for Error, That it does not appear that the Office is within the Juriſdiction of the Court, and the Action lies not but for the Special Damage, of which the Jury cannot inquire, if the Office be not within the Juriſdiction of the Court; but where Words are * actionable of themſelves, there the Jury may inquire for the Aggravation of Damages of a Matter out of the Juriſdiction, as *Taylor*'s Caſe in 1 *Cro.* where by Reaſon of Words (that of themſelves were) actionable, ſpoken within the Juriſdiction, the Jury may inquire for Aggravation of Damages of the loſs of Trade out of the Juriſdiction. And for this Reaſon the whole Court here, except *Kelynge*, held, That the Action was not well brought, and that the Judgment was erroneous: But *Kelynge* held the Matter of itſelf actionable, it being found to be falſe and malicious: But it was adjourned, and ſo it depended till *Mich.* 19 *Car.* 2. And then after divers Motions and Arguments, the Court ſaid, They would not intend the Port of *Exeter*, to be out of the Juriſdiction of the Court of *Exeter*, but within it, and affirmed the Judgment.

Judgment in an inferior Court for loſs of an Office, which does not appear to be within the Juriſdiction of the Court. S.C. 1 Sid. 342. 2 Keb. 267. Vide Paſch. 22. Bernard v. Bernard, *pais icy*, pag. 289. Vide 1 Vent. 34. 1 Sid. 236. Poſt, 156, 289. 3 Lev. Ante 137, &c. ibid.

* P. 154

The Port of *Exeter* intended to be within the Juriſdiction of the Court of *Exeter*. Vide poſt, 156, 289.

Baker againſt *Berisford.*

DEBT for Rent, as Adminiſtrator of an Adminiſtrator of a Leſſee for thirty Years, who demiſed to the Defendant for twenty Years, rendering Rent, and that the firſt Adminiſtrator had paid Debts of the firſt Inteſtate, to the Value of the Term, on which the Defendant demurs; becauſe the Plaintiff had not ſhewn that the firſt Adminiſtrator had paid the Debts with his own Money; and it may be he paid them with the Money

Adminiſtrator pays Debts of the Inteſtate, and does not ſay, with his own Money. S.C. Raym. 58. 1 Sid. 76. Clayt. Rep. 116. 1 Keb. 285. Vide 1 Roll. Abr. 922, 923.

Mo. 2, 260. Cro. El. 115, 120. 1 And. 24. 1 Leon. 111. Hob. 49. 250. Godb 217. Winch. 70. Keilw. 63. 1 Sid. 76. 1 Jo. 33. 5 Mod. 136, 145. 4 Bac. Abr. 369. 2 Term. Rep. 97. 587, 597.

Money of the firſt Inteſtate, for which Cauſe the Court held the Declaration ill. But it being further declared, That he elected and took the Term in Satisfaction, the Court held it a ſtrong Implication, if not a plain Averment, That he paid them with his own Money: And thereupon in *Eaſter* Term following, they gave Judgment for the Plaintiff.

* P. 155

* *Sherwood's* Caſe.

Record made of a Confeſſion in Court, &c. S. C. 1 Keb. 341.

HE having forged the Chief Juſtice's Hand to divers Bails, and being brought into Court and examined, confeſſed it, of which Confeſſion a Record was inſtantly made, and Judgment given, That he ſhould be ſet in the Pillory three ſeveral Days, at three ſeveral Places, and appear at the Bar with a Paper on his Hat, ſhewing his Offence; and this was done without Information, only upon the Record of his Confeſſion.

† 2 Show. 176.

Clapham againſt *Moyle.*

Proviſo to pay is a Covenant. S.C. 1 Keb. 842, 860, 897. V. Dyr. 222. 2 Co. 70, 71, &c. Cro. Car. 129. 1 Rol. 518. Co. Lit. 203. b. 2 Com. Dig. 438. Cowp. 600. Doug. 27, 766.

IN Debt, he declares on Articles indented, whereupon *Clapham* was upon the Marriage of *Moyle* to receive the Marriage Portion of *Moyle's* Wife, being 1500*l.* and that *Clapham* ſhould convey an Office to *Moyle*; provided, That *Moyle* out of the firſt Profits of the Office ſhould pay to *Clapham* 500*l.* and avers that he had conveyed the Office, and that the Defendant had received 500*l.* out of the Profits, but had not paid. And on Demurrer it was adjudged, That the Action brought on the *Proviſo* well lies, for this *Proviſo* is not by way of Condition or Defeaſance, but by way of Agreement to pay the 500*l.*

Bois againſt *Norliffe.*

Matter which proves the Writ abateable, not aſſignable for Error, but Matter

ERROR of a Judgment in Ejectment aſſigned, That the Plaintiff after Verdict, and before Judgment entered; and it was argued by *Weſton*, That it is not aſſignable, for nothing is aſſignable which proves the

the Writ abateable, but only that which proves it abated, and cited 4 *H.* 6. 27. 8 *E.* 4. 19. 2 *Cro.* 303. 1 *Bulſt.* 5. whereto *Jones* anſwered, That that is true, where the Party hath Time to plead it, but that he had not here after Verdict: But by the Court, it is not aſſignable for the Reaſon given by *Weſton*, and they affirmed the Judgment.

which proves it abated, is. S. C. 1 Sid. 238. 1 Keb. 841, 850. 1 Str. 492.

* *Stone* againſt *Waddington.* * P. 156

ERROR of a Judgment given in the Court at *York*, where the Plaintiff declared, That the Defendant being indebted to him at *York*, within the Juriſdiction, for divers Goods to him ſold and delivered, did then and there promiſe to pay; and the Judgment was reverſed, for that it was not ſhewn where the Goods were ſold and delivered, and that may be out of the Juriſdiction.

Judgment in an Inferior Court reverſed, the Goods not ſaid to be ſold within the Juriſdiction. 1 Keb. 842. V. ante 50, 69, 96, 105, 137, 153. 1 Sid. 259. Poſt. 208, 289.

Ering againſt *Streete.*

CASE, for ſaying to the Plaintiff, *Thou haſt ſtole as much Lead out of my Maſter's Houſe as is as big as a Houſe*; moved in Arreſt of Judgment, That it might be Lead fixed to the Freehold: Like the Caſe in *Cro. Thou haſt ſtolen Iron Bars out of my Maſter's Windows*, intended to be the Iron Bars fixed, and here it might be the Covering of the Houſe. But by the Court, it might have been ſo intended, if the Words had been *ſtole off my Maſter's Houſe*: But the Words being *out of my Maſter's Houſe*, it ſhall be intended Lead there lying.

Haſt ſtole Lead out of my Maſter's Houſe.

Harris againſt *Willis.*

ERROR of a Judgment in the Common Pleas, where the Caſe was on the Statute of 12 *Car.* 2. for Confirmation of Miniſters, which eſtabliſhes ſuch as were in Poſſeſſion the 25th of *December* 1659. Provided that it ſhould not prejudice ſuch as were preſented by the King before the 9th of *December* 16, 59. And here the

Preſentment to a Church, intended to extend to Inſtitution and Induction. S. C. 1 Sid. 239. 1 Keb. 844.

the Parſon was preſented by the King (before) but not inſtituted and inducted till after. And it was adjudged in the Common Pleas, That he being preſented was within the *Proviſo*; and of the ſame Opinion were *Hyde*, *Wyndham* and *Kelynge*; but *Twyſden* not having read the Act, would give no Opinion, becauſe *Preſentment* is ſometimes taken to preſent, inſtitute and induct as a * Grant of an Annuity till he be preſented, ſhall not determine till Induction, which is the Perfection thereof. But Judgment was affirmed by the other Three.

* P. 157

Price againſt *Parker*.

Adminiſtration duly granted according to the Statute, cannot be revoked without juſt Cauſe.
S. C. 1 Sid. 280.
1 Keb. 146, 854.
Poſt, 186, 305.
1 Sid. 280, 293, 372.
Yelv. 83, 125.
Style 10.
1 Browl. 51, 91.
6 Co. 18.
Cro. El. 459.
1 Mod. 62.
2 Saund. 148.
2 Lev. 55, 86, 90, 173, 182.
1 Wood's Con. 88. 2 Atk. 285.
2 Stra. 917.

DEBT for Rent brought as Adminiſtrator: The Defendant pleads, That the Adminiſtration granted to the Plaintiff was *debito modo* revoked and granted to *J. S.* The Plaintiff replies, That he was the next of Kin to the Inteſtate, and that he had ſued an Appeal from the ſaid Sentence, whereto the Defendant demurs, and it was argued at the Bar in this Term, and in *Eaſter* Term following: And the principal Point argued, was, Whether the Ordinary having granted the Adminiſtration to the next of Kin according to the Statute, could revoke it? And it was argued for the Plaintiff, That when the Ordinary had granted the Adminiſtration according to the Statute, he had executed his Power given him by the Statute, and had nothing further to do in the Caſe, 2 *Rolle's Abr.* 303, 27, 28. and 1 *Cro. Fotherlie's* Caſe, and the ſame in *Levein's* Caſe, *Sty.* 10, 74, 75. and Sir *George Sand's* Caſe in this Court within two or three Years laſt paſt: Where the Son of Sir *George* being dead, and the Adminiſtration granted to him, it not being then known that the Son had any Wife. And afterwards the Wife diſcovering herſelf, ſued to repeal it, and was prohibited. But for the Defendant it was ſaid, That an Adminiſtration was only a Deputation, and in its Nature always revocable; and that Adminiſtration in this Kingdom did originally belong to the Ordinary by the Laws of the Realm, and was not given to them by any Statute, nor loſt, as is ſuppoſed by 9 *Co.* in *Henſlo's* Caſe. and cited *Selden's Titles of Honour*, *Pa.* 713, 714. and by their Law they might have granted it to whom they pleaſed, and have revoked it when they

they pleaſed. And the Alterations that have been made by Statute are 31 *Ed.* 3. *c.* 11. which appoints the Ordinary to depute the next Friends to the Dead, and gives to them an Action, which the Perſon deputed by the Ordinary before could not have. Then the Statute 21 *H.* 8. goes further, and directs, That it ſhall be granted to the Wife, or next of Kin, under a Penalty; ſo that at this Day, if they * grant it to any other, it is not void, but they incur the Penalty only; and ſo it remains as it was before a Power committed by the Ordinary, and revocable in its Nature; and cited 3 *Cro.* 163,460. *And. Rep.* 303. 27 *H.* 8. 26. and *Ow.* 50. which Caſes are all ſince the Statute 21 *H.* 8. *Wyndham* on the firſt Argument held, That the Ordinary could revoke. *Twyſden* held, That he could not without juſt Cauſe, as if the Adminiſtrator becomes Lunatick, or where it was not duly granted at firſt; and the Cauſe ought to be ſhewn to the Court, ſo that they might judge thereof: And it is not enough to ſay, That it was *debito modo* revoked, To which *Wyndham* replied, We ought to believe that their Proceedings are juſt, till the contrary appears. *Hyde*, Chief Juſtice, held, That after Adminiſtration granted according to the Statute, it cannot be revoked without juſt Cauſe, as Lunacy; but whether the Cauſe ought to be particularly pleaded, he ſaid, would be the Queſtion. And it was adjourned; and afterwards in *Eaſter* Term, *Wyndham* agreed, That the Ordinary could not revoke an Adminiſtration granted according to the Statute without juſt Cauſe, and that the Court here is Judge of the Cauſe; but after he is made by the Court there, this Court ought to intend it done upon juſt Cauſe; and the Party who will revoke an Adminiſtration, ought by Pleading to ſhew the Cauſe, ſo that it may appear to the Court to be (granted) without juſt Cauſe. And *Kelynge* and *Twyſden* held, That the Cauſe was to be ſhewn by the Party who procured the Revocation, ſo that it may appear to the Court to be revoked for juſt Cauſe. But they both (all) agreed, That it might be revoked for juſt Cauſe, as if it was unduly granted contrary to the Statute at firſt, or if the Adminiſtrator afterwards becomes diſabled by Lunacy or the like. But it was adjourned, and ſo it long depended; but, as I heard, Judgment was afterwards given for the Plaintiff, becauſe by the Appeal, the Sentence of Revocation was ſuſpended.

* P. 158

Cauſe of Revocation to be ſhewn in Pleading, &c. Poſt. 186, 305.

Judgment.

And

And *Note*, Juſtice *Wyndham* ſaid, That the Roll cited, whereon *Coke* grounded his Opinion in *Henſlo's* Caſe, is 7 *H.* 3. where a Writ was directed to the Sheriff to ſeiſe the Goods of an Inteſtate into the King's Hands, whereupon he collected, That Adminiſtration belonged to the King. But (ſays he) That was only a Prerogative Writ to ſeiſe the Goods of an Inteſtate, who was indebted to the King, to the Intent the King ſhould be * P. 159 ſatisfied his * Debt before others, as the Law is at this Day: But *Note* alſo, That *Lyndewode* acknowledges the granting of Adminiſtrations did not belong to the Ordinary of Right, but that he only had it by the Conceſſion of Princes. See the Caſe of *Offly* and *Beſt*, hereafter, *pag.* 186, 187. and that of *Ravenſcroft* againſt *Ravenſcroft*, *pag.* 305. *Hill.* 22 & 23 *Car.* 2. *B. R.*

Poſt. 186, 187. Poſt. 305.

Clarke againſt *Molineux.*

A *Habeas Corpus* by Juſtices of Peace, to diſcharge one arreſted in coming to the Seſſions. S. C. 1 Sid. 269. 1 Keb. 845. Raym. 100.

CASE againſt the Sheriff, for an Eſcape upon meſne Proceſs: The Defendant pleads a *Habeas Corpus* by the Duke of *Newcaſtle*, and other Juſtices of the Peace, at the Seſſions of the Peace, to bring the Priſoner before them, who for that the Arreſt was made on the Perſon coming to the Seſſions, diſcharged him, becauſe he ought not to be arreſted in going or returning, &c. on which the Plaintiff demurs; and *Wyndham* and *Twyſden* inclined the Privilege ought to be allowed, or elſe the King's Buſineſs would remain undone. But by *Kelynge*, the Juſtices of Peace cannot grant a *Habeas Corpus*. And it was adjourned.

The *King* againſt the *City* of *Canterbury.*

Exemption of Jury-Men not to be allowed by the Sheriff's Return, but by the Prayer of the Party. S. C. Raym. 113.

INDICTMENT for a Riot there, being to be tried at the Bar, and the *Venire* returned, on the *Diſtringas* the Sheriff returns a Grant of King *James* I. That the Citizens ſhould not be returned to ſerve on Juries out of the City, except in Caſes of Treaſon. And it was doubted by the Court, whether ſuch a Privilege could come (in Debate) on the Sheriff's Return, and it ſeemed

ſeemed not; but that the Party when he comes in may excuſe himſelf thereby. 30 *Aſſ.* 1. 18 *H.* 8. 5. And *Jones* of Counſel with the City, ſeemed afterwards to agree thereto. But for another Cauſe the Return was clearly inſufficient, *viz.* That he had returned the Panel on the *Venire*, whereby he admits them chargeable to ſerve; and then he cannot afterwards return a Diſcharge from ſerving upon the *Diſtringas*.

* Earl of *Stamford* againſt *Needham*. * P. 160

BY the Court, If the Sheriff on an Inquiſition upon an *Elegit*, returns the Defendant to have twenty Acres in *Dale*, and twenty Acres in *Sale*; and delivers the twenty Acres in *Sale* for the Moiety of the Whole, all is void; for he ought to deliver a Moiety of the twenty Acres in each Vill; and this might be avoided in Evidence in Ejectment brought for the Lands,

On an *Elegit*, the Moiety of every Part is to be delivered. S. C. Ante 56, 1 Sid. 239. 1 Keb. 858.

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* Termino Paſchæ, * P. 161

ANNO

17 Car. II. in Banco Regis.

Swallow againſt *Emberſon*.

DEBT againſt an Executor, who pleads that *J. S.* is Co-executor with him not named in the Writ, Judgment of the Writ, but does not aver that the other had

An Executor pleads another Executor not named, not ſaying that he had adminiſtered.

S. C. 1 Sid. 242. 1 Keb. 865. Vide poſt, 181, 299, 300 Cro. El. 387, 541. 4 Leon. 193 3 Lev. 37, 194. 1 Sid. 33. 1 Chan. Rep. 238.

had administered; whereupon the Plaintiff demurs, and the Plea was adjudged ill. For although when an Executor sues, the Defendant may plead another Executor not named, without shewing that the other hath administered, because he cannot know whether he has administered or not; yet when an Executor is sued, if he pleads another Executor not named, he ought to go further and say, That he has administered, for that lies in his own Conuzance.

Quick against *Coppleton.*

A Promise in Consideration of Forbearance, by one who is not liable. S. C. 1 Sid. 242. 1 Keb. 886. Post, 165.

ASSUMPSIT. Whereas the Defendant's late Husband was indebted to the Plaintiff, and she about to come to *London*, and being in fear to be arrested by the Plaintiff, she promised him in Consideration that he would not trouble her, and would forbear till *Michaelmas*, to pay, *&c.* After Verdict it was moved, That she not being shewn to be Executor or Administrator, her Forbearance was not any Consideration, which was agreed by the Court: But the subsequent Words *forbear till Michaelmas*, are distinct and general, not only to forbear her but all others, and makes a good Consideration, whether she be liable or not; and they cited *Heriot* and *Hinton*'s Case adjudged, That a general Forbearance is a good Consideration,* whether the Party promising be liable or not. But *Kelynge* at first doubted, that by the Copulative *Et*, all was one Sentence; and that it was not only to trouble her, but also to forbear her till *Michaelmas*; but afterwards he agreed with the others; and Judgment was given for the Plaintiff. And *Hyde* Chief Justice held, That a Forbearance to sue one who fears to be sued, is a good Consideration; and he cited a Case in the Common Pleas, when he sate there, where a Woman who feared that the dead Body of her Son would be arrested for Debt, promised in Consideration of Forbearance, to pay; and it was adjudged against her, though she was neither Executor nor Administrator. But of this the other Judges here doubted.

* P. 162

The

The *King* againſt *Approved Men* of *Guilford.*

A *Mandamus* to reſtore an Approved Man, they return certain ſcandalous Words ſpoken by him of another Approved Man, for which being ſummoned before the Mayor and Aldermen in their Court, he ſaid, that he would juſtify it; for which they ſuſpended him: It was objected, That the Return was ill, becauſe not returned any Power to turn out; and by the Court, it was ill if they had turned him out, but here he is only ſuſpended: And by *Hyde* Chief Juſtice, and *Kelynge*, a *Mandamus* does not lie for ſuſpending, for the Freehold ſtill remains in him: But *Twyſden* with his whole Force to the contrary; For a Suſpenſion is a temporary Amotion, and perhaps they will never diſcharge the Suſpenſion; and *Wyndham* being abſent it was adjourned.

Q. If a *Mandamus* lies for one ſuſpended from his Office.
S. C. 1 Keb. 868, 880.
Raym. 152.
2 Keb. 1.
Vide 1 Sid. 14.
2 Sid. 97.
2 Show. 317.

Wilkinſon againſt *Boulton.*

IN Treſpaſs and Impriſonment, the Defendant juſtified by the Cuſtom of *London*, That the Mayor and Aldermen ſhould have the Cuſtody of all male Orphans till twenty-one, and of Females till twenty one or married, and of committing them to Guardians; and any Perſon taking them from the Guardian, is to be brought to the next Court and to be impriſoned; and that the Plaintiff took ſuch an one an Orphan, out of the Guardianſhip of ſuch an one, and was (thereon) brought to the next Court and committed in Priſon to the Defendant. Whereupon the Plaintiff demurs; and it was objected by *Williams*, That the Plea was not good to take a Man without Notice of his Crime, and to bring him to the * Court to be immediately committed; that he ought to have Notice for what Cauſe he was brought to the Court, that ſo he might be prepared to anſwer. But by the Court, this Pleading, That he had committed the Offence, and was convicted thereof (is ſufficient,) and the Matter is Criminal, for which every Juſtice of Peace may commit. 2*dly*. It was ſaid by him, The Cuſtom is not good to commit without Exception of Peers. But by the Court, a Peer is not privileged in

Cuſtom for the Cuſtody of the Orphans of *London*, pleaded.
S. C. 1 Sid. 250.
Raym. 116.
1 Keb. 868, 895.
2 Danv. 312. B. 3.
Vide 2 Lev. 32.

* P. 163

1 Sid. 250.
Raym. 116.
1 Mod. 80.

this Case, for in *Homine replegiando* where he detains the Body, he shall be committed, *F. N. B.* 68. *C.* 11 *H.* 4. 15. *b.* Wherefore Judgment was given for the Defendant.

2 Show. 218 to 232.

Amcots against *Amcots.*

Issue on a dilatory Plea tried by Jury, is peremptory. 8. C. Raym. 118. 1 Sid. 152. 1 Keb. 869, 900. Q. 2 Danv. 773. H. 3. V. ante 142.

ERROR of a Judgment on a *Formedon* in Remainder, where the Tenant pleads Infancy, and that the Remainder descended to him, and prayed his Age. The Demandant pleads, That the Remainder did not descend to him, Issue joined, and found for the Demandant and Judgment final, and that assigned for Error. Argued by Serjeant *Newdigate*, That there ought to be a *Respondeas ouster*; He agreed, That generally on an Issue upon a dilatory Plea Judgment final ought to be given, but that Infants were not to be within this Rule, and he cited many Authorities of the Privileges of Infants, but none that came up to this Case. To whom *Jones* answered, The Law is general, and if he would have Infants excepted, he should shew a Precedent thereof, *L.* 5 *E.* 4. 90. The Law is general upon any Issue joined. But see *Fitz. Issue* 14. *Age* 22. An Issue joined on Infancy tried by Inspection, and a *Respondeas ouster*; but in all Cases when the Issue is upon a Dilatory, and tried *per pais*, the Judgment is peremptory, otherwise it is in all Cases where it is tried by Demurrer, except it be in one only, and that is in the Case of a Demurrer upon Evidence, where it is Peremptory, because no *Respondeas ouster* can be, because the Parties are at the End of their Pleading, *L.* 5 *E.* 4. 139. 2 *E.* 4. 10. And the Reasons why Judgment is peremptory on an Issue tried *per Pais*, are, for that the Delay is greater, and that Issues of Fact lie in the Cognizance of the Parties, but Issues of Law not. And the whole Court were of Opinion, That the Judgment ought to be final, and affirmed the Judgment in *C. B.* except Cause shewn, *&c.*

Guillan

* *Guillan* againſt *Gill.*

* P. 164

A MAN makes two Executors, one whereof makes his Executor and dies, and afterwards the ſurviving Executor dies inteſtate; a Legatee ſues the Executor of the Executor who firſt died, in the Spiritual Court for his Legacy, who pleads this Matter, which Plea they refuſed, wherefore he prayed a Prohibition, and it was denied; for the Matter is Teſtamentary. And perhaps the Executor of the Executor has all the Goods in his Hands, and is Executor of his own Wrong, and no other in the Caſe to be ſued for the Recovery of the Legacy. And tho' the Survivor ſhall have all by our Law, it is not perhaps ſo in theirs, and the Matter belongs to their Law; and if they proceed wrong, he ought to appeal, but they ſhall not be prohibited by this Court; and the Prohibition was denied.

Two Executors are, the one dies, and then the other; and the Executor of the firſt was ſued in the Spiritual Court for a Legacy. No Prohibition where they proceed in an Eccleſiaſtical Matter although contrary to our Law. S. C. Raym. 123.

Buckler againſt *Angil.*

ASSUMPSIT, and declares, That in Conſideration that the Plaintiff would ſurrender a Term, the Defendant *would be willing to pay* 10*l.* After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That here was no Promiſe, and then *Non Aſſumpſit* was no Iſſue to be tried; and ſo held the Court, and ſtayed the Judgment.

Aſſumpſit that he would be willing to pay. S. C. 1 Sid. 246. 1 Keb. 878. Raym. 123. V. Cro. El. 912. 1 Salk. 27. Noy. 50. Doug. 658. 2 Term. Rep. 28.

The *King* againſt *Worms.*

AN Outlawry in Treſpaſs was reverſed, for that it was *Utlegat'* for *Utlagat' eſt*; and another was reverſed the ſame Term, between the *King* and *Pleyter*, and alſo another between the *King* and *Cowly* for the ſame Cauſe.

Falſe Latin, &c. Vide 2 Show.

* P. 165

* *Wirrall* againſt *Brand.*

Two Executors ſued in *Aſſumpſit*, and one dies, the Writ ſhall abate.
S. C. 1 Sid. 259.
Raym. 131.
1 Keb. 906.
V. 2 Lev. 82.

ASSUMPSIT againſt two Executors on the Promiſe of a Teſtator; Iſſue *Non Aſſumpſit*, one Executor dies, which is ſuggeſted on the Roll, and the Trial had againſt the other, and Verdict for the Plaintiff. And it was moved by *Jones* in Arreſt of Judgment, That the Bill was abated by the Death of the one in Caſes of Contract, but otherwiſe in Caſes of Treſpaſs, as 50 *E.* 3. 7. 40 *E.* 3. 26 *b. Fitz. Brief.* 263, 344. & *Plowd. Com.* 186. *b.* In Caſe of Executors ſued on a Contract, the Death of one abates the Writ. But of this, in Caſe of Executors, the Court at firſt doubted; but at another Day having ſeen the Caſe in *Plowd.* 186. *Woodward* againſt *Davis*, which is directly in Point, they reſolved, That the Writ abated and ſtaid the Judgment.

i. e. *Where Plaintiffs. But N. B. here they are Defendants.*
Q. Stat. 8 & 9 W. 3. c. 10.

Hunt againſt *Swain.*

Conſideration to forbear one not chargeable in *Aſſumpſit*, not good; otherwiſe of a Conſideration to forbear in general.
S. C. 1 Sid. 248.
Raym. 127.
1 Keb. 890.
1 Danv. 57.
V. 2 Saund. 136.
1 Vent. 159.
1 Sid. 31.
ante 161.

ASSUMPSIT againſt the Heir on a Promiſe, in Conſideration he would forbear him till *Michaelmas* to pay, &c. After Verdict, Judgment was ſtaid, becauſe it does not appear, That the Anceſtor obliged himſelf and his Heirs, and the Conſideration is not to forbear generally, but to forbear him who does not appear to be chargeable; and afterward the Plaintiff perceiving the Judgment of the whole Court againſt him, prayed a *Nil Capiat per Billam*, with Intent to begin *de Novo*. And *Note*, the Caſe of the Lord *St. Paul* was cited to be adjudged contrary in the late Times; but to that the Court gave no regard, and *Twyſden*, who was of Counſel in that Cauſe, ſaid, That it was then taken to be a hard Caſe.

Prichard's Caſe.

By Prorogation of the Parliament all their Orders are redetermined.

ON an *Habeas Corpus* for bringing him hither, it was returned, That he was taken by an Order of the Houſe of Peers for a Contempt; and the Houſe of Peers being

S. C 1 Sid. 245. Raym. 120. 1 Keb. 887.

being prorogued, it was held by the Court, That their Orders are all at an End, and every Thing elſe before them, except Writs of Error and *Scire Facias* thereupon.

* *Anonymus.* * P. 166

ASSUMPSIT in Conſideration the Plaintiff would deliver to *J. S.* ten Quarters of Malt, to pay him for it on Requeſt, if *J. S.* did not do it; and ſays, That he delivered it, and that *J. S.* had not paid, and that ſuch a Day he requeſted the Defendant, and that he had not paid: And at a Trial in *Middleſex* before *Twyſden* and *Wyndham*, the Defendant would put the Plaintiff to prove the Requeſt, but the Judges would not permit it, for the Requeſt was traverſable, and not being traverſed, is admitted, and (ſo) the Iſſue ariſes ſolely on the *Aſſumpſit*, the Defendant having pleaded *Non Aſſumpſit*.

Promiſe to pay on collateral Requeſt, on *Non Aſſumpſit*, the Requeſt being traverſable, is admitted.

Note, Towards the End of this Term, *Hyde*, the Chief Juſtice, died ſuddenly at his Chambers in *Serjeants-Inn*; in whoſe Place *Kelynge* was (afterwards) made Chief Juſtice, but not till *Michaelmas* Term following at *Oxford*, the Term being kept there becauſe of the Plague at *London*.

Term.

Term. Sanct. Trin.

ANNO

17 Car. II. in Banco Regis.

Opy againſt *Thomaſius.*

Settlement of the Reverſion, with Power to make Leaſes in Poſſeſſion. Q. If a Leaſe in preſent of a Reverſion expectant upon another Leaſe, be a Purſuing the ſaid Power. 1 Sid. 260. S.C. Raym. 132. 1 Keb. 778. 910. 3 Bac. Abr. 416, 417. Powell on Powers 412. Cowp. 260. 1 Term. Rep. 705.

IN Ejectment, upon Not guilty and a Special Verdict the Caſe was, That one *Rouſe* ſeiſed of Lands in Fee, made a Leaſe for Ninety-nine Years, if three Perſons or either of them ſo long lived; and afterwards *Rouſe* levied a Fine of them to the Uſe of *A.* for Life, the Remainder to *B.* for Life; the Remainder to *C.* in Tail. Provided, That each of them might ſucceſſively make Leaſes for Ninety-nine Years, or three Lives in Poſſeſſion, or for two Lives in Poſſeſſion, and one in Reverſion; or for one Life in Poſſeſſion and two in Reverſion: And that during the firſt Term *A.* made a Leaſe for Life to the Defendant, and that afterwards *A. B.* and *C.* levied a Fine to the Leſſor of the Plaintiff; and the firſt Leaſe being determined, the Defendant enters as upon the ſecond Leaſe, and the Conuſee of the Fine entered, and let the ſame to the Plaintiff. And two Queſtions were made. *Firſt*, If the ſecond Leaſe (*A.* and *B.* being dead) being now leaſed by Tenant in Tail, be purſuant to the Power? *Secondly*. If not, then, whether the Conuzee of the Fine may avoid it as the Iſſue in Tail might have done? And it was argued for the Plaintiff, That the Leaſe was not purſuant to the Power, for that was to make Leaſes in Poſſeſſion, and the Poſſeſſion was demiſed before by the firſt Leaſe, and ſo it is only a Leaſe in Reverſion; and *Thecomb* and *Hawkins*'s Caſe in

Whether Conuſee of Tenant in Tail, may avoid a voidable Leaſe as the Iſſue in Tail might do.

2 *Cro.*

2 *Cro.* was cited in Point: And as to the ſecond Point, That the Conuzee may avoid the Leaſe as the Iſſue in Tail might have done; and a Difference was taken, where Tenant in Tail did * an Act which might be to the Advantage of the Iſſue, that is not void, but only voidable; but where the Act cannot be of Advantage to the Iſſue; as if he grants a Rent, or makes a Leaſe without rendering any Rent, it is void, *Plowd.* 436. 12 *H.* 8. 8. and then without doubt it ſhall not bind the Conuſee, it being void in itſelf. And if it be not void, but only voidable, yet the Conuzee may avoid it, as the Iſſue might have done, *Co. Litt.* 46. *Plowd.* 437. But for the Defendant it was ſaid, If the Settlement had been of Lands in Poſſeſſion, then without Doubt the Power could not extend to make a Leaſe in Reverſion; but the Settlement being of a Reverſion, the Power ought to be taken, to make Leaſes in Poſſeſſion *in præſenti* of the Reverſion; for it cannot be ſuppoſed, that a Tenant for Life ſhould expect to make a Leaſe for Life after three Lives ended, who would probably ſurvive him: And as to the ſecond, the Leaſe is not void, but voidable by the Iſſue, by Virtue of the Statute *De donis*, which extends only in privity to the Iſſue. *Plowd.* 424. *Co. Litt.* 46. *b.* and *Kelynge* inclined, That this Leaſe was within the Power, for the Settlement being only of the Reverſion, a preſent Leaſe of the Reverſion is within the ſame; and he held, That if it were not within the Power, That yet it was not a void, but a voidable Leaſe, and that the Conuzee may notwithſtanding avoid it as the Iſſue in Tail might. *Wyndham* and *Twyſden* held, That the Settlement being of a Reverſion, if the Words of the Power had been general to make Leaſes, a Leaſe of the Reverſion, or a Leaſe in Reverſion had been within it: But the Power here being expreſsly to make Leaſes in Poſſeſſion, this Leaſe in Reverſion is not within it; and they held it not void but voidable. And *Twyſden* held, That the Conuzee could not avoid it. But *Wyndham* held, That the Conuzee might avoid it as the Iſſue could: And they both obſerved the Particulars of the Power to make Leaſes for two Lives in Poſſeſſion and one in Reverſion, or one in Poſſeſſion and two in Reverſion; ſo that it appeared the whole Scope and Intent was not to have an Eſtate above three Lives in being at one Time. But it was adjourned.

* P. 168

Johnſon

* P. 169

* *Johnſon* againſt *Pie.*

An Infant, Q. if chargeable in an Action for a falſe Affirmation, whereby one is deceived.
S. C. 1 Sid. 258.
1 Keb. 905, 913.
2 Danv. 770. pl. 14.
Vide ante 86
Noy 129, 130.
1 Sid. 129, 258.

CASE, for that the Defendant being an Infant, affirmed himſelf to be of full Age, and by Means thereof the Plaintiff lent him 100*l.* and ſo he had cheated the Plaintiff by this falſe Affirmation: After Verdict for the Plaintiff on Not guilty, and 100*l.* Damages, 'twas moved in Arreſt of Judgment, that the Action would not lie for this falſe Affirmation; but the Plaintiff ought to have informed himſelf by others, and cited *Grove* and *Nevill*'s Caſe, to be adjudged in this Court in *Eaſter* Term 16 *Car.* 2. *Rot.* 400. where in Caſe againſt an Infant for ſelling a falſe Jewel, affirming it to be a true one, 'twas adjudged the Action did not lie: To which 'twas anſwered, That this is a Treſpaſs on the Caſe, and an Infant is chargeable for Treſpaſſes, though not for Contracts. *Kelynge* and *Wyndham* held, That the Action did not lie, becauſe the Affirmation being by an Infant was void; and it is not like to Treſpaſs, Felony, *&c.* for there is a Fact done. *Twyſden* doubted, for that Infants are chargeable for Treſpaſſes, *Dyer* 105. and ſo if he cheat with falſe Dice, *&c.* But 'twas adjourned.

But ſee 1 *Keb.* 905, 913. Judgment arreſted.

Loe againſt *Bordmore.*

Caſe does not lie for indicting one of a Reſcue.
S. C. 1 Sid. 261.
1 Keb. 881, 915.
Raym. 135.

CASE for falſly and maliciouſly indicting one of a Reſcue, where he acknowledged he was not preſent at the Reſcue: After Verdict for the Plaintiff 'twas moved in Arreſt of Judgment that the Action did not lie for ſuch an Indictment which does not ſound in Scandal, but only in Treſpaſs; and if it ſhould, it would be too great a Diſcouragement to Perſons to proſecute for the King; but where the Indictment ſounds in Scandal, as Felony, *&c.* there it would lie: And *Wyndham* and *Twyſden* Juſtices, being only in Court held, That the Action did not lie, and ſtay'd the

the Judgment. But, *Twysden*, said, That if the Action had been laid more specially, *viz.* That the Defendant knowing it to be false, did it purposely to vex him and to draw him into Trouble, and to cause him to expend his Money, perhaps the Action had been maintainable.

1 Salk. 13, 15. 2 Mod. 306. 5 Mod. 349, 405. 6 Mod. 30, 90, 169, &c.

* *Jemmot* against *Cooly*. * P. 170

EJECTMENT, and on Not guilty a Special Verdict was, That *Drake* seized of Lands in Fee granted a Rent to *Bovy* in Fee, with Condition, That if the Rent be arrear by twenty Days after any Day of Payment, he or his Heirs might enter and take the Profits till he be thereof satisfied; The Rent being arrear, he enters and demises to the Plaintiff, and the sole Question was, Whether by the Entry he had gained such an Estate as thereof he might make a Lease? And the Case was argued at the Bar three Times, *viz.* this Term by *Jones* for the Plaintiff, and *Thursby* for the Defendant; and afterwards in *Easter* Term 18 *Car.* 2. *Nudigate* for the Plaintiff, and *North* for the Defendant (*For in* Michaelmas *and* Hillary *Terms, nothing of Moment was done because of the Plague*) And in *Trinity* 19 *Car.* 2. by *Finch* the King's Solicitor for the Plaintiff, and *Maynard* for the Defendant: And at length the whole Court, *viz. Morelon, Wyndham, Twysden* and *Kelynge* then Chief Justice, delivered their Opinions *seriatim* for the Plaintiff. The Objection for the Defendant was, That the Lessor by the Entry gained only an Estate at Will, and so could not make a Lease for Years, and it could not be a Freehold for want of Livery, nor a Term for Years, for it is not for any Term certain. And in an incertain Interest of Continuance whereof Leases may be made, as the Case of an *Elegit*, or by Will for Payment of Debts; but not by Conveyances between the Parties; and that it was neither a Freehold nor a Chattel, but a meer Tenancy at Will, and so determined by the Entry of the Defendant, were cited 37 *H.* 6. 26. and 4 *Co.* 30. as a Case in Point. See *Bro. Leases*, 67. 8 *Co.* 96. 1 *Inst.* 42 *b. Plo. Com.* 524. *Fitz. Barr.* 80. *done* 200. But for the Plaintiff it was argued, That it is not material what

A Rent granted in Fee, with a Proviso that the Grantee may enter and retain till satisfied out of the Profits, he may make a Lease to try Title in an Ejectment. S. C. Raym. 135, 158. 1 Sid. 223, 262, 344. 1 Saund. 112. 1 Keb. 784, 915. 2 Keb. 20, 184, 270, 295. 2 Bac. Abr. 172. 4 Bac. Abr. 362. Sanders on Uses and Trusts. 292.

what Eſtate it is, for it is an Intereſt in the Land depending on the Grant of the Rent that makes it good and 'twas likened to *Litt. Sect.* 327. A Feoffment rendering Rent, with Condition on Non-payment to re-enter and retain till ſatisfied is a good Grant by Intent
P. 171 of the Parties; and yet there is no * Livery by the Feoffee to reconvey the Land, nor no expreſs Grant, but only a Condition to re-enter till he be ſatisfied, and 2 *Cro.* 510. *Havergill* and *Hayes*'s Caſe, a Rent granted with Clauſe of Diſtreſs, and a Fine levied to the Uſe, That if it were Arrear, the Grantee ſhould enter and retain till he be ſatisfied, but this was by way of Uſe: And *Trin.* 14 *Car.* 2. in the Common Pleas, *Edgar* and *Molins*, a Rent was granted with Condition of Entry upon Non-payment, and to retain till ſatisfied as here; and in Ejectment on a Special Verdict, adjudged, That a Leaſe made by the Party after Entry, was good. But the Counſel for the Defendant ſaid, That the Caſe of *Edgar* and *Molins* was between Father and Son, and it might be good by way of Uſe. But the Plaintiff's Counſel ſaid, That *Bridgman*, Chief Juſtice, and the whole Court, except *Browne*, conſidered it only as a Grant, and that it was as good in a Grant as in the Limitation of an Uſe. And in *Michaelmas* the 19 *Car.* 2. the Court delivered their Opinions. *Moreton* held, That by the Entry the Grantee gained an Inheritance, which deſcended to his Heir, and that a Man might grant an Inheritance (of an Intereſt) in the Land without Livery; as *veſturam terræ*, 17 *E.* 2. 6 *Hutt.* 44. *Fitz. Precipe* 55. and *Wyndham* ſaid, So he may grant the Trees which are an Inheritance (or inherent) in the Land. But by *Kelynge*, *Twyſden*, and *Wyndham*, the Power of Entry is an Inheritance, and deſcends with the Rent to the Heir; but when Entry is made, it is then no more than a Chattel-Intereſt in the Land, which ſhall go with the Arrears to the Executors. And *Twyſden* ſaid, That if it was not for the Words, *And to retain till he be ſatisfied out of the Profits*, it would have been an Inheritance in the Land to remain in the Heir as a Penalty, but by reaſon of thoſe Words it is only a Chattel, and ſhall go to the Executors, who are the Perſons that are to be ſatisfied of theſe Arrears: And they all agreed, That *Havergill* and *Hayes*'s Caſe, and

Edgar

Edgar and *Molins*'s Caſe cited by the Plaintiff, did rule this Caſe in Point. And all the three Juſtices held, That after Entry they could not cut Trees or commit Waſte, but only take the ordinary Profits.

* *Newton* againſt *Shaſto.*

* P. 172.

IN Ejectment on Not guilty, a ſpecial Verdict found the Lands to be cuſtomary, and held of the Honour of *Tinmouth*; and that the Cuſtom of the Manor was, That if the Father died, leaving no Son but two or more Daughters, that the elder Daughter ſhould have it only for her Life, and that after her Death it ſhould deſcend to the next Heir Male, who could derive thro' Males; and for Default of ſuch it ſhould eſcheat to the Lord; and another Cuſtom, That if the Tenant died leaving a Wife, that ſhe ſhould have it for her Life, and that the Tenant here left a Wife and two Daughters, but no Son; and that the Wife entered, and the elder Daughter died in the Wife's Life; and that afterwards the Mother died, and that there was not any Heir Male deriving thro' Males: And that the Lord entered as in his Eſcheat, on whom the ſecond Daughter entered, and leaſed to the Plaintiff. And the Caſe was argued at Bar this Term; and two Queſtions were made, 1*ſt*. Whether the Cuſtom were good? 2*dly*. If the ſecond Daughter not being the eldeſt Daughter at the Time of her Father's Death, could have the Lands within the Cuſtom, altho' ſhe was the only Daughter at the Time of her Mother's Death? And 'twas objected, That the Cuſtom was vain and unreaſonable, to diſinherit the Heirs for want of Heirs Males, claiming by Males; and they cited the Cuſtom of Tauiſtry. But on the other Side 'twas ſaid, That all Cuſtoms deviate from the Common Law, and ſuch a Cuſtom might be good in thoſe Northern Parts, to have Males Owners of Land, in reſpect of the Neighbourhood to *Scotland*: And they cited the Cuſtom of *Taunton-Dean*, That if the Huſband died ſeiſed in Fee, his

A Cuſtom that if the Father dies, leaving no Sons, but two Daughters, the eldeſt ſhould have the Eſtate for her Life, *&c.* and that the Wife ſhould have it for Life, A Man dies, leaving a Wife and two Daughters, the elder dies in her Mother's Life, the ſecond Daughter ſhall have the Eſtate for her Life.

S. C. 1 Sid. 267. 1 Keb. 925. 2 Keb. 141. &c. 2 Danv. 550. pl. 3. Vi. poſt. 293. 1 Roll. ab. 502. pl. 12, 623. A. 1, 2, 3. 1 Mod. 102. 2 Sid. 61. Style 145, 146. Godb. 265, 266. Co. Lit. 140, 110. 4 Leon. 242. Cro. Jac. 411. 1 Salk. 245. 6 Mod. 120.

Poſt 293. 1 Lev. 138. Com. Dig. 108. Ld. Raym. 1024, 1028 3d. Peere Will. 63.

his Wife ſhould have the Inheritance, and might ſell it. And if ſhe married a ſecond Husband, he ſhould have the Inheritance. But it was ſaid at the Bar, That that had been reputed to the Cuſtom, but was never adjudged and allowed. And afterwards in *Hillary* Term, 18 & 19 *Car.* 2. *Kelynge*, Chief Juſtice, briefly delivered the Opinion of the Court, That the Cuſtom was good, and that the ſecond Daughter ſhould have the Land for her Life within the Cuſtom, for altho' ſhe was not the elder Daughter at the Death of the Father, yet ſhe was ſo at the Time of the Mother's Death, and her Eſtate made a Continuance of the * Huſband's Eſtate 'till her Death, as in the Caſe of *Freebench*: And they gave Judgment for the Plaintiff, being the Leſſee of the ſecond Daughter.

* P. 173

Bayly againſt *Bunning*.

Officer executes a Writ in the Goods of one who before that was a Bankrupt. 1 C. 1 Sid. 73, 171. Keb. 638, 830, 932. Keb. 32. 1. ante 95. Bankrupt.

IN Trover, on not guilty, a Special Verdict found, That *J. S.* did an Act of Bankrupcy the ſixth of *June*; *J. D.* ſued a *Fieri facias*, teſted the 4th of *June*, but really ſued out the 11th of *June*; and by Virtue thereof, the Defendant, being a Bailiff, took the Goods, and afterwards a Commiſſion of Bankrupcy was ſued, and the Goods were aſſigned by the Commiſſioners to the Plaintiff: And if the taking by the Defendant was lawful, they find for the Defendant, and if not, for the Plaintiff. And two Points were argued, *1ſt*. That the Goods were bound and ſubject to the Commiſſion by the Act done, for the Statute ſubjects all Goods to their Diſpoſal, whereof no Execution is ſued and executed; and here the Act of Bankrupcy was done, not only before the Execution executed, but even before the ſuing of the Writ; and altho' by Common Law, the Goods are ſaid to be bound by the *Teſte* of the Writ, yet that 'tis here in Caſe of a Statute, which gives the Diſpoſition of all Goods, whereof no Execution is ſued and executed; and tho' in Fiction of Law, the Writ is ſuppoſed to be ſued at the Time it bears *Teſte*; yet that ſhall not prevail againſt an Act of Parliament; but the Word *ſued* in the Act ſhall be underſtood actually ſued. *2dly*. The ſpecial Conclu-

Whether Goods are bound by the Teſte of a Writ dated before the Bankruptcy, but in Truth ſued after. 1. 2 Sid. 126. 1. 2 Show.

ſion

ſion here ſhall not hurt the Plaintiff, but he ſhall maintain his Action (notwithſtanding;) for be it ſo, that the firſt taking by the Bailiff was lawful; in reſpect that the Writ ſhall be ſuppoſed ſued according to the *Teſte*, which was before the Act of Bankrupcy done; yet the Execution was afterwards, and therefore tho' the Taking were legal, yet the Detainer is illegal; and 'tis here found, That they were demanded of the Bailiff and denied to be delivered, which makes the Converſion; and Trover will lie, altho' the Party came lawfully to the Goods at firſt; if he detains them afterwards; as *Mo.* 103. 2 *Cro.* 244. for the detaining of a Pawn, and 1 *Cro. Chapman* againſt *Allen* for Goods agiſted; * ſo 3 *Cro.* 495. *E. N. B.* 169. Whereto 'twas anſwered for the Defendant, That the *Teſte* of the Writ is Matter of Record, and it cannot be ſaid to be ſued at any Time after the *Teſte*. And ſuppoſe it might be ſaid to be ſued after, yet the Bailiff ſhall be juſtified thereby, for he could not know what Acts the Bankrupt had done; and if he had known that, he could not know, whether any Commiſſion could be ſued or not; and it is not any Return for the Sheriff to ſay, That the Party is a Bankrupt, and therefore he is to be juſtified by the Writ. *Wyndham* ſaid, That notwithſtanding the ſuing of the Writ, the Goods are ſubject to the Diſpoſal of the Commiſſioners. But he, *Twyſden*, and *Kelynge*, all agreed, That the Iſſue is found for the Defendant, for the Taking by him was lawful by virtue of the Writ; and *Twyſden* ſaid, That the Goods were bound by an Act of Bankruptcy committed, ſo that a Sale in Market-overt afterwards ſhall not bind the Commiſſioners or their Aſſignees. But he ſaid, That whereas our Books ſay, that the Goods are bound from the *Teſte* of the Writ, that is to be intended, when the Writ is ſued when it bears *Teſte*, and not if it be ſued at any Time afterwards; and by that means it ſhall avoid all Sales made between the *Teſte* and the Execution, as is often done at the End of a Vacation, to ſue out a Writ teſted the Term before. And afterwards in *Eaſter* Term, 18 *Car.* 2. Judgment was given for the Defendant, he being an Officer, was obliged to execute the Writ, who could not know of the Acts of Bankrupcy, or that any Commiſſion would ever be ſued.

V. 13 Co. 56.
1 Cro. 262.
2 Mod. 255.
3 Mod. 2.
5 Mod. 426.
* P. 174
6 Mod. 212.
2 Show. Caſe 175.

V. ante 95.

Traverſe

Traverſe againſt *Twiſleton.*

Arbitrators before their Time expired, chooſe an Umpire, and afterward they themſelves make an Award.
V. Poſt. 285, 302.
1 Mod. 275.
Lutw. 539, 541, 542.
2 Saund. 129, 133.
Nelſ. Lutw. 167.

DEBT on an Obligation conditioned to perform an Award, and upon Demurrer, the Caſe was, That they ſubmitted to the Award of *A.* and *B.* ſo that they made their Award before the firſt of *May*; and if they did not agree, to the Umpirage of ſuch a one as they ſhould elect, ſo that he made his Umpirage before the ſaid firſt of *May*: The Arbitrators choſe an Umpire before the firſt of *May*, and afterwards the Arbitrators themſelves make the Award in Queſtion before the firſt of *May*, and whether this was good, was the Queſtion: For 'twas objected, That by their chooſing of an Umpire they had determined their Power, and put all Matters in the Power of the Umpire. *Twiſden*, Juſtice, inclined, That the Award was * good, and cited *Bernard* and *King*'s Caſe, *Style* 306. *Int. Paſch* 1751. *Rot.* 467. in this Court to be ſo adjudged: To which *Jones* of Counſel for the Defendant ſaid, That this Caſe is not like to that, becauſe there the Arbitrators and the Umpire were both elected by the Parties; but here the Umpire is elected by the Arbitrators, by which Act they themſelves have diſmiſſed themſelves from their Authority. And *Kelynge* and *Twyſden* being only in Court, 'twas adjourned.

* P. 175
1 Roll. Ab. 261, 265.
2 Mod. 169.
2 Jon. 167.
1 Salk. 70, 72.
Ld. Raym. 187.

See hereafter *pag.* 285, 302.
Vide 1 Danv. 542.
Vide Copping & Harrierd's *Caſe*. Poſt. 285. puis Hill. 30. & 21. Donavan & Maſcal's *Caſe*. Mich. 32. Poſt 302.

The King againſt *Dudeny.*

Indictment at the Seſſions, not ſaying the King's Seſſions, quaſhed.
S. C. 1 Vent. 39.
1 Sid. 247, 422.

AN Indictment was laid to be taken at the General Seſſions of the Peace in *London*, and 'twas quaſhed, becauſe not ſaid at the Seſſion of the Peace of the *Lord the King*.

Term. Sanct. Mich.

ANNO

17 Car. II. in Banco Regis.

MEMORANDUM, That this Term was adjourned from *Weſtminſter* to *Oxford*, becauſe of the Plague *viz.* from the firſt Return Day, to *Octabis Martini*, and ſo only the two laſt returns were held; and a Proclamation iſſued, appointing all Perſons to keep their Days then and there; and one Judge of each Court came the firſt Day to *Weſtminſter*, and there held the Eſſoins and read the Writ of Adjournment, and adjourned the Courts to *Octabis Martini* at *Oxford*; and at the Eſſoin-Day there, they only held the Eſſoins, and did not ſit in open Court till the *Quarto die poſt*: And by the Proclamation all judicial Hearings in the Chancery, Exchequer and Dutchy, and all Decrees were ſtayed; and in the King's Bench, Common Pleas, and Exchequer, no Trials by Jury, or Judgments upon Special Verdicts or Demurrer, were to be given.

Adjournment of the Term, becauſe of the Plague. S. C. 1 Sid. 275. Vide poſt, 178.

Abbot againſt *Weekly*, at *Oxford*.

TRESPASS for breaking his Cloſe; The Defendant preſcribes, That all the Inhabitants of the Vill, Time out of Memory, *&c.* had uſed to dance there at all Times of the Year at their free Will, for their Recreation, and ſo juſtifies to dance there: Iſſue was

Preſcription for Inhabitants to dance in another's Ground at all Times of the Year.

Vide poſt, 253, 268, 269. 2 Lev. 2. &c. *ibid.* 2 Shew. 9. 1 Salk. 335. 4 Com. Dig. 222, 471. * P. 177 Ld. Raym. 405. 2 Wilſ. 259. 2 Term Rep. 206.

on the Preſcription, and a Verdict for the Defendant, and to ſave his Coſts the Plaintiff moved in Arreſt of Judgment, That this Preſcription to dance in the Freehold of another, and ſpoil his Graſs, was void, eſpecially as it is laid, *viz.* at all Times of the Year, and not at ſeaſonable Times; and that 'twas alſo ill * laid in the Inhabitants, who although they may preſcribe in Eaſements, as 6 *Co. Gateward's* Caſe, and ſome other Books are, yet they ought to be Eaſements of Neceſſity, as Ways to a Church, &c. and not for Pleaſure only, as this Caſe is. *Secondly*, If it be good, it ought to have been laid by way of Cuſtom in the Town, and not by Preſcription in the Perſons; and a Caſe was cited, where 'twas ſo adjudged on a Demurrer: But by the Court, This is a good Cuſtom, and it is neceſſary for Inhabitants to have their Recreation. And as to the ſecond, That though perhaps it had been ill on a Demurrer, yet Iſſue being taken thereon and found for the Defendant, 'tis good; and Judgment was given for the Defendant.

Verdict againſt the Plaintiff, and he moved in Arreſt of Judgment.

Walker againſt *Hull.*

Executors bound by Covenant of Apprenticeſhip. Vide Strange 1266. Vide Cro. Car. 187. Yelv. 103. Jo. 223. Style 387, 406. 1 Sid. 332. 2 Vent. 56, 244.

COVENANT againſt an Executor, on the Covenant of the Teſtator to teach an Apprentice his Trade: And after Verdict for the Plaintiff 'twas moved in Arreſt of Judgment, That this Covenant was perſonal to the Teſtator, and did not oblige the Executors, but only obliged the Maſter during his Life to teach the Apprentice: But by the Court, It obliged the Executors alſo; and they ought to ſee the Apprentice taught his Trade, and if they are not of the ſame Trade, they ought to aſſign him to another who is of the Trade, ſo that he may be taught according to the Covenant: And they gave Judgment for the Plaintiff.

Term.

Term. Sanct. Hill

ANNO

17 & 18 Car. II. in Banco Regis.

MEMORANDUM, That *Hillary* Term was adjourned from *Oxford* to *Weſtminſter*, and from thence to *Windſor*, becauſe of the Plague; and from *Windſor* it was adjourned to *Weſtminſter* for the two laſt Returns, the Sickneſs being decreaſed at *London*: And *Note*, All Bills out of the King's Bench, commonly called Bills of *Middleſex*, were directed to the Sheriff of *Oxford* inſtead of *Middleſex*; and all Proceſs bore *Teſte* at *Oxford*; although that at the End of *Michaelmas* Term the Writ of Adjournment was read at *Oxford*, thereby adjourning the Term to *Weſtminſter*, from whence it was adjourned to *Windſor*; yet for that *Oxford* was the Place where the Court laſt ſate, the Bills and Writs were Teſted there, and the Bills directed to the Sheriff of *Oxford*.

Adjournment of the Term, &c. Writs, where Teſted. S. C. 1 Sid 276. Vide ante 176.

Note, Nothing was done this Term worthy to be reported.

Termino Paſchæ,

ANNO

18 Car. II. in Banco Regis.

Sheppard againſt *Penroſe.*

Preſcription to pay leſs than a Tenth Part for Tithes when good.
S. C. 1 Sid. 278.
2 Keb. 2.
1 Rol. R. 419.
V. Cro. Car. 264. 339.
1 Rol. Ab. 635. pl. 4. 8.
Noy. 108.
Hetl. 13, 14.
1 Vent. 5.
Pal. 527.

PROHIBITION for ſtaying a Suit in the Eccleſiaſtical Court for Tithes of Fiſh taken in the Sea, and for Tithes of Corn, where the Queſtion was, Whether the Twentieth Fiſh was payable in Satisfaction of all Fiſh there taken, and if the Twelfth Sheaf was payable in Satisfaction of all Sheaf-Corn? And by the Court, Tithes of Fiſh are not due without Cuſtom, and therefore a Cuſtom to pay leſs than a Tenth Part may be good; but of Corn the Tenth Part may be due of (Common) Right, and therefore a Cuſtom to pay *nothing*, is not good without other Matter. But they granted the Prohibition as to the whole *Niſi cauſa*, with Intent to hear what the other Party had to ſay.

John Grobham How againſt *Norton.*

Aſſumpſit on a *quantum meruit*, if he permitted him to enjoy Land.
S. C. 1 Sid.

ASSUMPSIT in Conſideration the Plaintiff would permit the Defendant to enjoy ſuch Lands, to pay him as much as he deſerved, and that he permitted him to enjoy it three Years, and that it was worth

10*l.*

Vol. per Annum. After Verdict for the Plaintiff, 'twas moved in Arreſt of Judgment; 1. That it does not appear that the Plaintiff had any Title to the Land 2*dly*. If he had (Title) that Debt lies and not this Action. But the Court held the contrary in both Points, and gave Judgment for the Plaintiff.

272, 150, 2 Keb 8. 1 Danv. 29, 50, 22. V. 2 Lev. 33, 3 Lev. 150. Style 463. 1 Leon. 155. 1 Vent. 211, 212. Hob. 284. Hutt. 35. 1 Roll. 7, 8, 9, 22. Ow. 42. 1 Cro. 343, 414, 515. Cro. Jac. 390. 1 Wood. Con. 272. 1 Tem. Rep. 389.

* *Roſſe* againſt *Roſſe*.

* P. 180

A PROHIBITION was prayed to ſtay a Suit in the Spiritual Court for Rent devis'd out of a Term; and Rent deviſed out of Lands, is not ſuable there, *Dyer* 151. *b*. 264. 2 *Cro*. 279. *Hob*. 265. *Wyndham* ſaid, That the Deviſe of the Term itſelf is ſuable there; and for the ſame Reaſon is the Rent thereout. *Kelynge* and *Twyſden* doubted, yet did not grant a Prohibition, but ruled to ſtay Proceedings till the other Party be heard.

Rent deviſed out of a Term, if ſuable in the Spiritual Court. S. C. 1 Sid. 279. 2 Keb. 5. 3 Bac. Abr. 489. Cowp. 424. Ld. Raym. 86.

Bromwich's Caſe.

THE Lord *Morly* and *Bromwich* being indicted for the Murther of *Haſtings*, the Lord *Morly* was tried by his Peers before the Lord High Steward, and found guilty of Man-ſlaughter, and was diſmiſſed without being put to his Book, or burnt in the Hand, according to the Statute of 1 *E*. 6. *c*. 12. And now *Bromwich* being brought to his Trial at the Bar of the King's Bench, the Indictment was againſt the Lord *Morly* for the killing of *Haſtings*, and againſt *Bromwich* for being preſent, aiding and aſſiſting; and 'twas proved by one Witneſs, That the Lord *Morly* killed *Haſtings*, but that at the ſame time they were fighting, *Bromwich* made a Thruſt at *Haſtings*, and thereupon the Lord *Morly* cloſed with him and killed him; and the Depoſitions of two other Witneſſes taken before the Coroner, which were now dead, were read to the ſame

A Peer found guilty of Manſlaughter without reading. S. C. 1 Sid. 277. 2 Keb. 19.

Depoſitions of Witneſſes before the Coroner they being dead, uſed for Evidence.

Foster's Cr. L. 316. 1 Hawk. P. C. 124. 1 Hall P. C. 455. 1 Cowper 830. Bull. N. P. 244.

same Effect, as they were read before the Lords on the Trial of the Lord *Morly*, by the Opinon of all the Judges of *England*. And it was proved, That when the Quarrel was in the Tavern, the Lord *Morly* said, *If we fight at this Time, I shall have the Disadvantage from the heighth of the Heels of my Shoes*, and that presently afterwards they went out into the Fields, and *Hastings* was there killed; which was taken by the Court as a clear Evidence of their Intention to fight when they went out of the Tavern; and the Quarrel being only touching Words, and they fighting within a little Time after, it was held Murther by the whole Court: For Words cannot be * any Excuse for the killing of a Man, and there need not be the Time of a Night between the Quarrel and the Fighting to make it Murther, but such Time only as it may appear not to have been done on the first Passion; and here it appears not to be done on the first Passion, for the Lord *Morly* had considered the Disadvantage of his Shoes: And the Court directed the Jury, That it was Murther in *Bromwick*, being present and aiding, although the Lord *Morly* had been found by the Lords to be guilty only of Manslaughter. But the Jury acquitted him of the Murther, and found him guilty only of Manslaughter.

* P. 181

What Time will make Murther.

He who kills found guilty of Manslaughter, yet the Abetter is guilty of Murther.

Hatton against *Mascal.*

Two Executors; whereof the one is an Infant, the other of Age, may sue alone. S. C. 1 Keb. 150. 1 Raym. 98. V. 2 Lev. 339, 240. Ante 161. Post. 299. 2 Lev. 38, 239. 2 Saund, 212, 213. 1 Mod. 47, 72, 296. 1 Sid. 449. 2 Rol. R. 380.

ERROR in the Exchequer-Chamber on a Judgment in the King's Bench. The Case was, a Man having a Judgment makes one of full Age, and two Infants his Executors; he of full Age proves the Will, and he alone brings the *Scire facias*, setting out the Truth of the Case, and has Judgment; whereon Error is brought and assigned, that all ought to have joined in the *Scire facias*. But by all the Justices, on Advice with the Civilians, it was no Error, for the others cannot prove the Will during their Nonage; and the Judgment was affirmed, for the Execution of the Judgment shall not be delayed till the Infants come of full Age.

And

And *Note*, in *Trinity* Term, the 31 *Car.* 2. *B. R.* *Colborn* againſt *Right*, the Executor of full Age alone, who had proved the Will, brought an Action of Debt for Arrears of Rent, and this Caſe being cited, Judgment was for the Plaintiff. 8, C. 3 Keb. 8. 41. Q. ante 31.

* *Gilpin* againſt *Cookſon*, * P. 182

ERROR of a Judgment in Dower of the Third Part of a Mill, of a Kiln-houſe, and of two Acres of Land, where the Judgment was to recover Seiſin of the third Part of the aforeſaid Tenements in Severalty by Metes and Bounds; and the Error aſſigned was, That the Judgment of the Mill and Kiln ought not to be by Metes and Bounds, *Co. Lit.* 32. *a.* and if it ſhould be divided by Metes and Bounds, neither of the Parties could uſe his Part, but the whole muſt be uſed entirely, and the Judgment ought to have been of the third part only, *Co. Ent.* 171, 175, 176, 181. *Raſt. Entr.* 238. *b.* And afterwards the Judgment was reverſed.

Dower of the 3d Part of a Mill, Judgment to hold in Severalty by Metes and Bounds, ill. V. Co. Lit. 32. Cro. Jac. 621, Keil. 104, 826. 2 Danv. 654. Pl. 11, 12, &c. 1 Roll. Abr, 678. pl. 7. Tid. Prac, 187.

Term.

Term. Sanct. Trin.

ANNO

18 Car. II. in Banco Regis.

Walſingham againſt *Comb.*

Plea of *Non infregit Conventionem* ill upon Demurrer, tho' good after a Verdict. S. C. 1 Sid. 289. 2 Keb. 51. Vide 3 Lev. 19, *&c. ibid.*

COVENANT on a Conveyance of Lands, where the Vendor covenants, That he was ſeized in Fee, and aſſigns a Breach, That he was not ſeized in Fee, and ſo had not performed his Covenant. The Defendant pleads, That he had not broken his Covenant; and on the Iſſue ſo joined, a Verdict was for the Plaintiff: And it was moved in Arreſt of Judgment, That this was not any Iſſue, it conſiſting only of two Negatives, *viz.* That he was not ſeized in Fee, and (ſo) had not performed his Covenant on the Plaintiff's Part, and that he had not broken his Covenant on the Defendant's Part: Alſo, That the Pleading is too general, and ought not to be allowed, for that he ought to anſwer particularly in Covenant to the Breach aſſigned: The Court at firſt doubted, but afterwards gave Judgment for the Plaintiff, for it is an Iſſue argumentative and informal; for if he had not broken his Covenant he was ſeized in Fee, and if he was not ſeized in Fee, he had broken his Covenant, ſo that it is not wholly immaterial, and informal Iſſues are cured by Verdict, though immaterial Iſſues are not.

Informal Iſſue cured by Verdict, immaterial Iſſue not. 3 Lev. 19.

See the Caſe of *Pitt* againſt *Ruſſel in C. B.* (3 *Lev.* 29.) for the Plea in Covenant, where a Breach was aſſigned in not repairing of Houſes and ſeveral other Things: The Defendant pleads he had not broken his Covenant; the Plaintiff demurs; and the Plea was adjudged ill, becauſe no good Iſſue can be taken on two Negatives; alſo this way of Pleading is too general.

* *Popham* againſt *Woolcote.*

* P. 184

TRESPASS for entering his Cloſe, and throwing down his Hurdles fixed to his Freehold: The Defendant pleads that the Place where, *&c.* is a common Space (or open Place) in ſuch a Town, and the Place of a Market there, and for that the Hurdles were there fixed he threw them down; whereto the Plaintiff demurs, and divers Exceptions were taken to the Plea; for which it was ruled to be ill: But then it was objected, That the Action does not lie, becauſe it appears that the Place where is a Common Space, *&c.* and the erecting of Hurdles there is a Nuiſance, which every Man may throw down: But by the Court, This does not appear by the Declaration, but by the Plea which is ill; and the Defendant has not pleaded it, and relied thereupon, but another Matter which is not ſufficiently pleaded; and they gave Judgment for the Plaintiff.

Declaration good, tho' by the Plea it appears no Cauſe of Action; yet being ill pleaded, Judgment for the Plaintiff. S. C. 1 Sid. 291. 2 Keb. 53.

Browning againſt *Litton.*

ASSUMPSIT againſt Executors on a Promiſe by the Teſtator, who plead *Non Aſſumpſit*; whereon was a Verdict and Judgment for the Plaintiff; and Error was aſſigned, That it does not appear by the Plea who did not aſſume, *&c.* for it is not pleaded that the Teſtator did not aſſume, *&c.* The Court on the contrary ſaid, it ſhall be intended the Teſtator; for here is no Charge of any aſſuming by the Executor, but of the Teſtator only: And *Latch* 125. *Baker*'s Caſe, was cited, where in Debt againſt Executors on the Teſtator's

An Executor Defendant, pleads *Non Aſſumpſit*, and does not ſay who, yet good. S. C. 1 Sid. 292. 2 Keb. 57. Lex Teſtam. 409, 410. Vide 1 Lutw. 334. & *ibid.* 15, & 20.

tor's Bond, the Plea of *Non eſt factum ſuum*, it was adjudged, That *ſuum* ſhall be intended of the Teſtator; and they affirmed the Judgment.

* P. 185

* *Bolls* againſt *Atkinſon*.

An Abbot Time out of Mind held Lands diſcharged of Tithes, the Alienee ſhall pay Tithes, for it ſhall be taken as a perſonal Preſcription, and not a real Compoſition. 8. C. 1 Sid. 320. 1 Keb. 162. 2 Keb. 28, 60, 85, 162, 175. Vide 2 Show. 184, 439, 460.

DEBT on the Statute of *E.* 6. for Tithes, and on *Nil debet* a Special Verdict found, That the Abbot of *Abingdon* was ſeized in Fee of Lands, being a Parcel of Meadow in *Oxford*, in Right of his Houſe, and that he and all Abbots, *&c.* his Predeceſſors, Time out of Mind, held it diſcharged of Tithes, and granted it to the College of *All Souls* in *Oxford*; And if the College ſhould hold it diſcharged of Tithes, as the Abbot did, was the Queſtion. And it was argued for the Plaintiff, That this Preſcription was perſonal, and that by the Alienation it was determined; and that ſo it would be if he had aliened to another Eccleſiaſtical Perſon, tho' capable of the Pernancy of Tithes, as 25 *H.* 6. 56, 57. the Caſe of the Hoſpitalers, and much more when aliened to a Lay Perſon not capable of Tithes; and they alſo cited 1 *Cro. Sidonne* againſt *Holms*, *Hob.* 5, 296, 297, 248, 309. *Co.* 2 *Rep.* 46, 47. 2 *Cro.* 58. *Cornwallis* againſt *Spurling*, *Bridgm.* 32, 33. And here they ſhall not be intended to be diſcharged by any real Compoſition, not being pleaded to be ſo. But on the contrary it was argued, That the Land and the Tithes might be granted to the Abbot before the Council of *Lateran*, for before that Council a Man might grant his Tithes to what Eccleſiaſtical Perſon he would. *Selden's Hiſtory of Tithes*, 306, 307, 351. 7 *E.* 3. 5. 44 *E.* 3. and this Abby was founded by King *Ina* before the Conqueſt, and he might have the Lands and the Tithes by Purchaſe, and hold them by way of real Compoſition, which differs from perſonal Diſcharges by way of *Bull*, *Order*, *&c.* which are perſonal, 1 *Cro. Morant* againſt *Commins*; and a College is capable of an Appropriation, and ſo is Spiritual as to the taking of Tithes, 7 *E.* 3. *Quare Impedit* 19. 5 *Co.* 10. of an Union, 6 *H.* 7. 13. 10 *H.* 7. 19. 11 *H.* 4. *Dyer* 255. *a.* of which no Lay Corporation is capable. And it was argued twice, *viz.* this Term, and in *Hillary* 18 & 19. In which Term after the ſecond

cond Argument, the Court took Time till another Day in the ſame Term, when the Opinion of the Court was delivered by the Chief Juſtice *Kelynge* alone, as a Caſe wherein they clearly all agreed, That it cannot be intended a * Diſcharge by a real Compoſition, it not being pleaded nor found by the Jury to be ſo; but was a meer Preſcription, and perſonal to the Abbot, and did not run with the Land. And Judgment was given for the Plaintiff. * P. 186

Offley againſt *Beſt*.

A Prohibition was prayed wherein the Caſe was, A Man died inteſtate, leaving a Siſter married to *Offley*, and a Brother, *viz.* the Defendant *Beſt*. *Beſt* enters a *Caveat*, after which *Offley*, pending the *Caveat*, it not being expired in Point of Time, procures Adminiſtration to be granted to his Wife without Notice to *Beſt*, for which Cauſe *Beſt* appeals, and *Offley* prays a prohibition, and the Court granted it, that the Plaintiff ſhould declare thereupon, ſo that upon a Demurrer the Matter might be ſolemnly argued, which was done, and is entered *Mich.* 18 *Car.* 2. *Rot.* 169. where all this Matter appears upon the Record; and afterwards in *Eaſter* Term 19 *Car.* 2. it was firſt argued at the Bar, and afterwards in *Trinity* the 20th, by all the Judges, *viz.* *Moreton*, *Wyndham*, *Twyſden*, and *Kelynge* Chief Juſtice. And three Queſtions were moved at the Bar: *Firſt*, Whether the Ordinary after Adminiſtration committed according to the Statute, might revoke it without any Cauſe at his Pleaſure, or if not, whether he might for Cauſe? *Secondly*, Whether the granting it pending the *Caveat*, be a good Cauſe to revoke it? *Thirdly*, If that be a Cauſe or not, whether this Court ought to judge thereupon, or leave it to the Delegates before whom the Cauſe depends? And as to the firſt it was agreed by all the four Judges, That where the Ordinary has granted Adminiſtration according to the Statute, he cannot revoke it without Cauſe, becauſe the Grantee has an Intereſt in the Goods by the Statute, which the Ordinary cannot take from him without Cauſe; but for a good Cauſe they all ſeemed he might; as if the Adminiſtrator becomes Lunatick.

Adminiſtration, if granted according to the Statute, cannot be revoked without Cauſe. S. C. 1 Sid. 293. 370. 2 Keb. 63, 72, 83, 208, 240, 392, 420. Ante 127. 2 Show. Vide 2 Lev. 55, 86, 90, &c. 3 Sid. 280, 293, 372. 1 Roll. Abr. 919. Poſt, 305. Ante, 157. 1 Mod. 62. 2 S-und. 148. 1 Woods Cow. 88. 2 Stra. 917. 2 Atk. 285. 2 Peere Will. 578. 2 Atk. 285. Ld. Raym. 684

Adminiſtration granted pending a *Caveat*, if revocable for that Cauſe.

Whether the Granting of Adminiſtration belonged originally to the Ordinary? Vide ante 158, 159.

Lunatick, &c. whereby he is diſabled to adminiſter. As to the ſecond Point *Moreton*, and *Wyndham* held, That the granting thereof pending the *Caveat*, was a Cauſe to revoke it; and they ſaid, That the Ordinary had original Power to diſpoſe of Inteſtates Goods by the Eccleſiaſtical Law of the Land, and it is not derived from the Crown by Act of Parliament; and denied that which is ſaid to the contrary in 9 *Co. Henſloe's* Caſe, but the Act of Parliament only directs to whom it ſhall be granted; but when it is granted, it is in its Nature * revocable as before, but not without Cauſe, by reaſon of the Intereſt, which the Grantee has therein. And as to the third Point, they ſaid, That the Judges Delegates are the proper Judges thereof, and of what Validity the *Caveat* ſhall be according to their Law; and it ſeemed to them, That it is as a *Superſedeas* in our Law; and as a Judgment given after that in our Law is erroneous, ſo it is in their Law after a *Caveat*; but be it ſo or not, it is to be judged by the Delegates, who are proper Judges of this Manner of Proceeding in their Courts touching a Matter Eccleſiaſtical, which belongs to their Courts, and not to this Court, which is not appriſed of their Forms and Manner of Proceedings; and therefore they held the Prohibition to be ill grounded, and that a Conſultation ſhould be granted. But *Kelynge*, Chief Juſtice, and *Twyſden*, as to the ſecond and third Queſtions, were of a contrary Opinion; and they denied that the Ordinary had Original Juriſdiction touching Inteſtates Goods, but that it was derived from the Crown, for they have no ſuch Juriſdiction in other Countries where the Canon Laws are of more force than here. And whatever Power they had touching the Probate of Teſtaments, yet it is certain they never had any Power of granting Adminiſtrations, but that which is given to them, is given them by the Statute; for an Adminiſtrator was never heard of before the Statute of *E.* 3. And as the Statutes appoint them to grant, ſo they ought to grant them as the Statutes appoint; and if they will not, a *Mandamus* lies out of this Court to compel them to grant them according to the Statute; and it would be in vain to command them to grant them, if when they had ſo done they might repeal them again at their

* P. 187

Where the King's Courts or the Eccleſiaſtical Court of Delegates ſhall be Judges of the Grant of an Adminiſtration pending a *Caveat*.

A *Mandamus* lies to grant Adminiſtration according to the Statute. V. ante 119.

their Pleaſure. And they ſaid, That the *Caveat* is of no force to hinder the Grant of the Adminiſtration, for it is not a judicial Act of the Court, but only an Entry of a *Memorandum* by a Clerk in Court, for the giving of a Caution, and is not any Record of the Court. And this Court are as well Judges thereof as the Delegates, and ſo died the Court in *Hutchins* and *Glover's* Caſe, 2 *Cro.* 463. and ſo they held that no Conſultation ought to be granted; and the Court being divided therein, and the Prohibition being granted before, the Delegates remained prohibited as they were before.

* *Ruſſel* againſt *Haddock.* * P. 188

ASSUMPSIT againſt an Executor, That whereas *J. S.* had a Judgment againſt the Teſtator, and had made a Letter of Attorney to the Plaintiff to recover and receive it to his own Uſe; the Defendant, in Conſideration that the Plaintiff would forbear Execution thereupon, promiſed to pay him. The Defendant demurred on the Declaration, ſuppoſing that it was no good Conſideration; for altho' the Plaintiff, who was but Attorney, did forbear, yet the Plaintiff himſelf in the Judgment might ſue Execution. To which it was anſwered, That the Plaintiff having Authority to receive it to his own Uſe, it ſhall not be intended that the Plaintiff in the Judgment would ſue Execution, for it ſhall be intended that it was aſſigned to the Plaintiff in Satisfaction of a Debt; and a Caſe between *Pitts* and *Bridgwater* in *Hillary* 1650. was cited to be ſo adjudged; and ſo held the Court here, and gave Judgment for the Plaintiff.

Conſideration that one who had a Letter of Attorney to receive a Debt would forbear, good, S. C. 1 Sid. 294. 2 Keb. 75, 80. 1 Danv. 45. Pl. 23. & 47. Pl. 11. N. Lut. 280. Vide 1 Roll. Abr. 20 Pl. 11. 1 Bulſtr. 338. 1 Sid. 283. 1 Sid. 123. 1 Mod. 166, Raym. 153. 1 Keb. 26, 44. 2 Lev. 17. Ante 28. Q. Poſt. 262. Burr. 2630. Dowg. 629. Cowp. 548. Salk. 278.

Huſſy againſt *Pacy.*

CASE, That whereas he had covenanted with *J. S.* not to import ſuch Goods; the Defendant being his Servant, knowing thereof inported the ſaid Goods, whereby he broke his Covenant, and was ſued

A Servant knowingly made his Maſter break his Covenant. S. C. 1 Sid. 298

2 Keb. 88.
1 Com. Dig. 164.
3 Bac. Abr. 564.
Cowp. 341.
1 Term. Rep. 535.

ſued thereupon by *J. S.* who recovered Damages againſt him. After Verdict for the Plaintiff on Not guilty, it was moved, That the Declaration is not ſufficient to maintain the Action, ſeeing it is not ſaid, That the Servant did it with that Intent to damnify the Plaintiff. But by the Court, Seeing that the Servant knew the Covenant, and did it deceitfully and maliciouſly, as the Declaration is, and the Plaintiff is thereby damnified, he ſhall recover, let the Servant intend what he will; and gave Judgment for the Plaintiff.

* P. 189

* The King againſt *Goffe.*

Amendment of an information of Perjury.
1 Salk. 47, 50.
2 Burr. 758.
2 Hawk. P. C. 348.

IT was moved to amend an Information of Perjury, and it was ruled, That they ſhould give Notice of the Things to be amended to the Defendant, and he to ſhew Cauſe why it ſhould not be amended; for the Court ſaid it might be amended.

Hawes againſt *Cornwall.*

Tithes of Wood above twenty Years and of Pollards.
8. C. 1 Sid. 300.
2 Keb. 90.

BY the whole Court, Wood uſually cut for Fire-wood, though permitted to grow ill twenty-five Years or more, ſhall pay Tithes; and by *Wyndham*, Pollards of fifty Years Growth ſhall pay Tithes when felled.

2 Danv. 592. Pl. 12, 13. Vide 2 Leon. 79, 80. Godb. 175. Moor 541, 908. Cro. Jac. 100, 101, 299. 1 Rol. R. 100. 2 Rol. R. 425. Cro. Eliz. 477. Gouldsb. 145. 11 Co. 49. Inſt. 643. 5 Bac. Ab. 59. Plowd. 470. Cro. Jac. 100.

Term.

Term. Sanct. Mich.

ANNO

18 Car. II. in Banco Regis.

Cotes againſt *Wade.*

DEBT for Rent, and counts, That *A.* being poſſeſſed of a Term, granted him a Rent out of it, which Term by meſne Conveyances is come to the Defendant. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Plaintiff had not ſhewn how the Term came to the Defendant, and a Man cannot plead a *Que Eſtate* of a Term, becauſe it cannot be gained by Diſſeiſin as a Fee may, nor by Occupancy, as a Freehold may, but by meſne Aſſignment (or Conveyance) which ought to be ſhewn how, as 3 *Cro.* 22. But by the Court, One may plead a *Que Eſtate* of a Term in a Stranger (generally) becauſe he cannot know his Title, but not in himſelf, or in thoſe under whom he claims: And Judgment was given for the Plaintiff.

A *Que Eſtate* in a Term pleaded in a Stranger, and not in thoſe by whom the Party claims. S. C. 1 Sid. 297. 2 Keb. 87, 96. 3 Lev. 19. Vide Raym. 389. 1 Salk. 363. 2 Salk. 562. 1 Mod. 231. 2 Mod. 243. N. Lut. 29. Salk. 29. Bur. 1099. 2 Peere Wil. 89.

The Duke of *Newcaſtle* againſt *Wright.*

IN Treſpaſs, the Defendant makes a Title to *J. S.* and that he died ſeized, and that it deſcended to himſelf as Heir, on which the Plaintiff demurs generally;

Diſcent as Heir, not ſhewing how good on a general Demurrer. S. C. 1 Keb. 110, 114. V. Poſt. 301. 2 Saund. 177, 179. 2 *Sc. ib.* 3 Lev. 325. 1 Term Rep. 361. Lev. 137, 194.

rally; but by the whole Court (except *Wyndham*) it is only Form, and it not being ſpecially demurred on, it is amendable.

* P. 191

* *Butcher* againſt *Vane.*

Condition of an Obligation to appear at the Court, and make appear that he had Common; That he was prepared to make appear, but that the Steward hindered him, is not ſufficient. S. C. 1 Sid. 313. 2 Keb. 118. 2 Danv. 89. pl. 10. 5 Co. 23. Cro. El. 716, 864. Salk. 180.

DEBT on Obligation conditioned, That whereas the Plaintiff had diſtrained the Sheep of the Defendant in ſuch a Place where the Defendant claimed Common, in Conſideration the Plaintiff had delivered the Sheep to the Defendant, if the Defendant did appear at the Lord's Court, at the next Court to be held for the Manor, and there make appear that he had Common there, the Obligation to be void. The Defendant pleads that he did appear at the next Court, and was there prepared, and did offer to make it appear, but that the Steward refuſed to permit him to make it appear; upon which the Plaintiff demurred, and had Judgment; for the Defendant had taken upon himſelf, not only to appear at the next Court, but alſo to make it appear, and he is at his Peril to procure the Steward to admit him to make it appear, as 5 *Co. Lamb*'s Caſe; and the ſame Day in a like Caſe between *Harding* and *Vane*, the ſame Judgment.

Jones againſt *Pope.*

The Statute of Limitations not pleadable for Eſcapes or Tithes. Debt for Eſcape, not ſhewing the Judgment, ill. Diſcontinuance after Argument. S. C. 1 Sid. 305, 415. 2 Keb. 93. Vide 2 Saund. 66. 121, 125. 1 Saund. 37. 2 Mod. 71, 311. Ante 48, 110. Sid. 84, 306.

IN Debt for an Eſcape, the Defendant pleads the Statute of Limitations, whereon the Plaintiff demurs; for that Statute is not pleadable in this Caſe, it not being Debt on any Lending or Contract, as the Statute ſpeaks, but is founded on a Tort, as an Action of Debt for Tithes, wherein it was ſaid, the Statute had been often times adjudged not to be pleadable: But then an incurable Fault was eſpied in the Declaration, which counts only on the Writ and the Eſcape, but omits the Judgment; whereupon the Plaintiff prayed leave to diſcontinue, which was granted, tho' after Argument; for the Sheriff ſhall not go unpuniſhed or eſcape for a Fault in the Declaration.

6 Mod. 240. 2 Salk. 420, to 425. Ante 48. Poſt, 192, 227, 298. 1 Mod. 13, 41, 166. 2 Lev. 118, 124. 1 Saund. 23. 2 Saund. 74.

Bennet

* *Bennet* againſt *Pilkins.*

* P. 194

DEBT on an Obligation, conditioned to appear on a Bill of *Middleſex*, returnable *Die Sabbati prox poſt quinden' Paſch.* The Defendant pleads, That he was arreſted on a Bill returnable *Die Veneris*, and pleads the Statute of 32 *H.* 6. and that the Bond was given for Eaſe and Favour: The Plaintiff replies, That he was taken on a Bill returnable *Die Sabbati*, and not *Die Veneris*. The Defendant rejoins, That he was taken by Virtue of a Bill returnable *Die Veneris, abſque hoc* that he was taken by Virtue of a Bill returnable *Die Sabbati*: The Plaintiff demurs. And it was argued by *Wylde* and *Pemberton*, That the Rejoinder was ill, and a Traverſe upon a Traverſe; for when the Plaintiff replied that he was taken by a Bill returnable *Die Sabbati & non Die Veneris*, the *Et non Die Veneris* was a Traverſe, whereon the Defendant might have joined and taken Iſſue. *Jones* and *Saunders* on the other Side argued, That the *Et non*, &c. was not any Traverſe, at leaſt not a formal Traverſe, or ſuch as the Books mention that a Traverſe cannot be taken upon a Traverſe; and to have joined Iſſue on the *Et non Die Veneris*, would have made an immaterial Iſſue; for it matters not whether he were taken by Virtue of a Bill returnable *Die Veneris* or not; for if he were not arreſted on a Bill returnable *Die Sabbati*, the Bond is void by the Statute: But if he were taken on a Bill returnable *Die Sabbati* it is good, and for that only is traverſable and triable; and ſo held the Court, and ruled Judgment for the Defendant *Niſi*, &c. Whereupon the Plaintiff prayed Leave to diſcontinue, whereof the Court would conſider: And afterwards for that the Defendant would not agree to accept an Iſſue on the Traverſe, nor put in Bail on the original Action, the Court gave Leave to the Plaintiff to diſcontinue, notwithſtanding the Demurrer had been argued.

A Traverſe by *Et non*, and a formal Traverſe afterward. S. C. 1 Saund. 20, 21, &c. 2 Keb. 94, 105.

Traverſe after an immaterial Traverſe. Vide 2 Lev. 112, 175. 1 Saund. 21, 23, 23. 1 Mod. 280. 2 Lev. 174. Vide Gold & Cutler's *Caſe*, Trin. 28 Car. 2. B. R. mes *intrat. Paſch.* 28 Rot. 205. 2 Co. 61. Hutt. 102. 1 Salk. 91. 1 And. 220. Dyer 91.

Diſcontinuance after Argument. 1 Salk. 178, 179. Vide prox. pag. ante.

* P. 193

* *Dring* againſt *Reſpaſs.*

An ill Traverſe, that the Court was held *coram majore* according to Cuſtom. S. C. 1 Sid. 229, 302. (2 Sid. 40.) 2 Keb. 107, 251, 122, 125, 152, 160.

DEBT, and declares on a Judgment obtained the firſt of *May*, in the 14th of the now King, before the Mayor and Bailiffs of *Norwich*, at a Court then held according to the Cuſtom of the City aforeſaid. The Defendant pleads, That the Court there according to the Cuſtom, &c. is held before the Mayor, *abſque hoc* that he recovered at the Court held the ſaid firſt of *May*, before the Mayor and Bailiffs, according to the Cuſtom aforeſaid: Whereupon the Plaintiff demurs, and it was argued for him, that the Traverſe was ill in traverſing a Matter of Record, which is not to be tried *per Pais*. And alſo in joining the Matter of the Cuſtom with that which is Matter triable *per Pais*; but he might have pleaded *Nul tiel Record*, which would have made an end of all; or that there was not any ſuch Cuſtom, and have tried it *per Pais*: But on the other Side were cited *Hob.* 244. *Hutt.* 20, 21. and Iſſue and Verdict, and Judgment. But *Kelynge*, *Twyſden* and *Moreton*, held it ill, it being on Demurrer, otherwiſe if after Verdict, as the Caſes cited are. But *Wyndham* held that it could not be good here, becauſe by this Traverſe he had made the Day Parcel of the Iſſue, and the other Judges agreed with him, that that was a Fault. But as to an Exception taken to the Declaration, *viz.* That it was not good, becauſe he declares as Adminiſtrator on Letters granted by the Archdeacon, and does not ſay *Ordinary of that Place*, nor *that it belonged to him of Right to grant it*: The Court held it good in Caſe of the Archdeacon, as well as in the Caſe of the Biſhop, for the Archdeacon is *Oculus Epiſcopi*; and by *Twyſden*, The Declaration is good, without ſaying *Ordinary of that Place*, becauſe he produces the Letters of Adminiſtration; otherwiſe in a Bar.

Traverſe made the Day Parcel of the Iſſue. Vid. 1 Saund. 22, 23.

Declaration on Adminiſtration granted by the Archdeacon, not ſaying to whom it belonged. 1 Sal. 40, 41, 38 Cro. El. 6, 431, 456, 838, 879.

Nelſon's Lutw. 122. Style 106. Vide Stat. 17 Car. 2. 1 Show 355. 4 Mod. 133. 2. Bac. Abr. 442. 5 Com. Dig. 207.

Cutler

**Cutler* and *Paſte* againſt *Southern* and *Halker*, in the Exchequer-Chamber.

* P. 194

DEBT on an Obligation dated the 8th of *March*, 16 *Car.* 2. conditioned, That whereas the Plaintiffs at the Requeſt of the Defendants, were obliged with them for the Payment of 100*l.* to *Thomas Cook*, on the firſt of *May* next following; to ſave the Plaintiffs harmleſs: The Defendants plead, That they ſaved the Plaintiffs harmleſs: The Plaintiffs reply, That before the ſealing of this Bond, *viz.* the firſt of *October*, 16 *Car.* 2. they became bound to *Cooke* with the Defendants for payment of 100*l.* at a Day now paſt; and for that the 100*l.* was not paid at the Day, *Cooke* ſued them at Law on the ſaid Bond, and endeavoured to arreſt them, *viz.* 12 *Feb.* 18 *Car.* 2. at *London*, in the Pariſh of *Bow*, ſo that they could not go about their Buſineſs: The Defendants rejoin, That they had no Notice thereof, and that if they had had Notice, they would have ſaved him harmleſs; whereupon the Plaintiffs demur. And now it was firſt objected for the Plaintiffs, That the Plea of ſaving harmleſs, not ſaying how, was not good; otherwiſe if they had pleaded *Non dampnificatus*, which was agreed to be no good Plea if it had been ſpecially demurred upon: But by the Court, It ſeems good on a general Demurer, but that is now vain by the Replication over. But then three Exceptions were taken to the Replication. *Firſt*, That it is not poſitively ſaid that the Money was not paid, but only *eo quod*, or for that it was not paid; but this Exception was over-ruled by the Court, for *eo quod* it was not paid, is as affirmative as *Et quia* the Rent was arrear in Avowries, *Co. Entr.* 122. *b.* In Debt for Rent, *Et quia* the Rent was arrear, the Action accrued; ſo the Word *Licet* in the Biſhop of *Sarum*'s Caſe, and in all *Aſſumpſits* on collateral Promiſes to pay on Requeſt, *licet* ſuch a Day and Place he requeſted, is an Affirmation and traverſable: A ſecond Exception to the Replication was, That it is, *That before the making of the ſaid Writing obligatory*, viz. *the ſaid firſt of* October, 16 *Car.* 2. the Plaintiffs were obliged for the Defendants, and that they were ſued for the Non-payment of the 100*l.* due on this Bond; where

S. C. 1 Saund. 116. Nelſon 1 Lutw. 129.

Plea, That he had ſaved harmleſs not ſaying how good on a general Demurrer. Vide Cro. El. 253. 2 Cro. 363. 2 Co. 4. Vide 1 Leon. 71 contr. Doug. 363. 4 Bac. Abr. 92. Strang. 81.

Et quod, &c. an Affirmative.

the firſt of *October* 16 *Car.* is after the eighth of *March* 16 *Car.* for he began his Reign the thirtieth of *January*, and ſo the Breach is aſſigned * for ſuing on an Obligation made after the Counterbond, and that the Counterbond cannot extend to any Thing that was not *in Eſſe* at the Time of the making of the Counterbond: But to this it was anſwered, and on Deliberation after divers Arguments reſolved by the Court, That the Words *ante confectionem Scripti Obligatorii*, were ſufficient, and the *Scilicet* repugnant and void, and that as well in Caſe of a Demurrer as after Verdict; and for this were cited 5 *Aſſ.* 6. 20 *H.* 6. 14. 5. which were before any of the Statutes which cure *Jeofails* by Verdict, the firſt whereof was the Statute of *H.* 8. and 3 *Cro.* 368. on Demurrer after the Statute of *Jeofails*. A third Exception to the Replication was, That it is not ſhewn in what Court, or how it was ſhewn, and this is Matter of Record, and therefore the Proceedings ought to be ſhewn, whereto *Nul tiel Record* might be pleaded. Whereto it was anſwered and reſolved, That well and true it is that ſo it ought to be; but the Intent thereof is to have it triable, and in this Caſe there needs no Trial, for by the Rejoinder it is admitted as for a Plea, that he had no Notice thereof, which admits that he was ſo ſued; but that he had not Notice thereof, which is as ſtrong as if he had ſaid, That well and true it is that he was ſued, and that if he had had Notice thereof, he would have ſaved him harmleſs. And a Difference was taken, where the Plaintiff makes Title by his Replication, and it thereby appears that he has no Title, no Rejoinder can by any Admittance or Implication make it good; but where he makes Title, tho' he does not plead it in ſuch a manner as he ought, eſpecially in Point of the Trial, the Rejoinder admitting this Matter, and tendering an Iſſue of another Matter, makes it good, and to prove the firſt Part of the Difference were cited 8 *Co.* 120. *b.* 133. *b.* 7 *E.* 4. 31. 2 *Cro.* 133. 3 *Co. Bridgman's* Caſe, 5 *Nicholl's* Caſe, 6 *H.* 7. 10. *b.* And to prove the firſt Part of the Difference were cited 22 *E.* 4. 2. 3. 3 *Cro.* 320, 708, 903, 917. And the Plaintiffs had afterwards their Judgment by the whole Court, and the Defendants paid the Money without more ado. *Levinz* for the Plaintiffs, and *Saunders* for the Defendants.

* P. 195

A *Scilicet* repugnant to the Matter precedent is void on a demurrer, as well as after Verdict.

A Suit pleaded and not ſhewn, how, or in what Court, is ill, but cured by a Plea over which admits it.

An ill Replication when cured by the Rejoinder.

Cheadle

* *Chealdle* againſt *Miller.* * P. 196

IN Replevin, an Avowry was for Damage feaſant: The Plaintiff in bar preſcribes for Common to two Acres of Land, and that for uſing thereof he put in his Beaſts. The Defendant demurs generally, and the Bar was adjudged ill, becauſe not ſaid, That the Cattle were Levant and Couchant; and it was ſaid to be ſo adjudged between the Lord *Say* and *Young*, 14 *Car.* 1. altho' it was doubted in *Stone* and *Muſſelton*'s Caſe, if it were not good without a ſpecial Demurrer: And the Court held here, That it was ill without a Special Demurrer; but they agreed it was cured by Verdict.

Want of *Levant* and *Couchant*, ill on a general Demurrer, but cured by Verdict.
S. C. 1 Sid. 313. 2 Keb. 12, 108, 120.
V. 1 Mod. 74. 1 Saund. 348. 2 Saund. 4, 5. 2 Lev. 246. Noy. 145.

Courtny againſt *Philps.*

DEBT on Obligation, dated 14 *June*, 17 *Car.* 2. conditioned to appear *die Veneris in tres Trin. ad reſpondend' Edwardo Prideaux*: The Defendant pleads the Stat. 23 *H.* 6. and that the Party was arreſted the 13th of *June*, and detained in Priſon till the 19th of *June*, and that *dies Mercurii in tres Trin'* was that Year on the 14th of *June*; and that after the 14th of *June*, *viz.* the 19th of *June*, he made the Obligation; *abſque hoc* that he made it the 14th of *June*, or at any Time before the 19th of *June*, on which the Plaintiff demurs, and the Traverſe was adjudged ill; for it ought to have been, *abſque hoc* that it was made before the Day of the Writ; for of the Day of the Month on which the Return of the moveable Terms is, the Court is not obliged to take Notice.

The Court cannot take Notice of Return-Days in moveable Terms as to the Days of the Month.
S. C. 1 Sid. 196. 2 Keb. 108, 109, 122.
V. 2 Mod. 60.

Hall againſt *Planner.*

TRESPASS for a Battery: The Defendant juſtifies as Churchwarden, for that the Plaintiff being in the Church in the Time of Divine Service, and ſitting there with his Hat on his Head, and refuſing to take it off his Head, upon Requeſt; the Defendant took it off his Head, which is the ſame taking, &c. whereon the

Churchwardens may take the Hat off the Head of one who ſits there covered during Divine Service.

the Plaintiff demurs; and it was adjudged that the
* P. 197 Juſtification * was good; for although the Church-wardens may preſent this in the Eccleſiaſtical Court, yet they are not bound in the mean Time to permit ſuch Irreverence and Indecency in the Church.

Middleton againſt *Shelly*.

A Statute without a Defeaſance, good, if Money proved to be paid.

THOMAS Shelly 43 *Eliz.* entered into a Stat. of 100*l.* to *Roſe Langworth*; and afterwards 43 *Eliz.* he entered into another Stat. to *Middleton*; which was for an Aſſurance of the Manor of *D.* to him for Money by him paid: But no Defeaſance was of this Stat. *Thos. Shelly* being indebted to Sir *John Shelly*, mortgaged the Manor of *D.* to Sir *John Shelly*. And *Roſe Landworth* 43 *Eliz.* extended her Statute, and thereby continued Poſſeſſion for a long time, till it was ſatisfied, but kept on Foot by Aſſignments. *Middleton* preferred his Bill to be let in after *Roſe Longworth*'s Statute, and before Sir *John Shelly*'s; which Bill was then diſmiſſed. Three or four Years afterwards, Sir *John Shelly* purchaſes the Equity of Redemption of *Thomas Shelly*: And *Middleton* now brings another Bill to be let in upon Sir *John Shelly*: And though it appears, that Sir *John* at the time of the Purchaſe of the Equity of Redemption had Notice of *Middleton*'s Statute; yet the whole Court denied to relieve him on this Bill. And reſolved, 1*ſt*. That although there was not any Defeaſance on the Statute to *Middleton*, who had made a Statute, not to find any Relief in Chancery, and was decreed in *Foſter* and *Peacock*'s Caſe, in the time of the Lord Keeper *Coventry*; yet it here appearing that the Money was paid, that ſupplies a Defeaſance, and ſo it was an Agreement to have the Manor conveyed to him for th Money; and ſo *Bonham Norton*'s Caſe, was decreed in the time of the ſame Lord Keeper *Coventry*; and alſo that after a decree before Execution, the Parties making an Agreement in writing, which one of them afterwards would not ſtand to; the Court would not permit him to take Advantage of the Decree, which he had waved by the Agreement but ſet aſide the De-

After a Decree, the Parties making a new Agreement ſhall be bound by it, though contrary to the Decree.

cree,

cree, and compelled him to perform the Agreement. And it was agreed by all the Barons, That although *Middleton* had once extended his Statute on an Infant, which was void; yet the Extent being void, he was relievable in this Court: And * it was in like manner agreed, That though for a great Part of the Time there was Infancy in this Case, so that he could not extend the Statute, yet he might have sued in Equity, during the Infancy, to have Relief, although he could not have extended the Statute at common Law. But seeing he had done it, but had sate still near fifty Years without seeking Relief in Equity, by reason of the Antiquity of the Statute, and long Forbearance, they would not relieve, but dismiss this Bill. And they said, That in some Cases the Conusee of the Statute should be relieved against a Purchaser, by taking in prior Incumbrances, and in some Cases not; And the Difference did depend on the Circumstances, as in this Case.

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Though a Statute is not extendable against an Infant, yet Relief in Equity thereon against Infants.

Johnson against *Astell.*

ASSUMPSIT, on Issue *Non Assumpsit*, and a Special Verdict, the Case was, *Astell* being an Officer of the Custom-house at *Newcastle*, and *Johnston* and *Fell* Merchants. and that the Custom to be paid for Rye, when the Price does not extend beyond 32*s. per* Quarter, is 4*s*, And that *Fell* and *Johnston* had imported several Quantities of Rye, and a Question being between the Plaintiff and Defendant, what the Custom did amount to, and what Sum *Fell* had paid, the Defendant in Consideration that the Plaintiff would pay to the Defendant 100*l.* which was less than in Truth the Customs did amount to, did assume, That if *Fell* had not paid more, the Plaintiff should pay no more, and that *Fell* had paid no more than 100*l.* yet the Defendant had caused the Plaintiff to be disturbed by the Commissioners to pay more, and that he was by them compelled to pay more. And now it was argued by *Weston*, That here is not any Consideration for the Promise, for he had not paid more than he ought,

Assumpsit to pay that which is before due, without any other Consideration, is good.
S. C. 1 Keb. 155, 156. 1 Danv. 67, 68. V. 1 Sid. 212. 1 Keb. 744. 2 Jo. 284. Cart. 223. 1 Lev. 3. 3 Lev. 344. 1 Roll. ab. 17 Pl. 11, 12. & 10. 29 30.

An Officer agrees, that the Party ſhall pay leſs than is due for Exciſe, is a good Conſideration.

ought, and which was due; and a Promiſe in Conſideration to pay that which is due, and which he is compellable to pay, is not any Conſideration for raiſing an *Aſſumpſit*. 2*dly*, The Conſideration for paying leſs than what was due, and that he ſhould cheat the King as *Fell* had done, and that by Agreement with the King's Officer, was a void Contract and Agreement. But by the Court, as to the firſt Payment without Suit, * or Trouble of that which is due, is a good Conſideration. *Secondly*, Acceptance by the Officer of leſs than is due, and Agreement by the Officer, That the Merchant ſhall not pay more, is a good Contract between the Officer and the Merchant; for the Officer ſhall anſwer to the King for the Reſidue out of his own Purſe.

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Quære of this Point.

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* P. 200

* Term. Sanct. Hill.

ANNO

18 & 19 Car. II. in Banco Regis.

Executor confeſſes Judgment in Debt on ſimple Contracts, and then pleads them in Bar of *Aſſumpſit*.

INDEBITATUS Aſſumpſit againſt an Executor, for divers Wares and Merchandizes ſold and delivered to the Teſtator; the Defendant pleads ſeveral Judgments in Actions of Debt, ſpecified due by the Teſtator on ſimple Contract, recovered againſt himſelf by *Non ſum informatus prout patet per ſeperalia Records inde*, which

which are yet in force; and that he has not Aſſets beyond ſuch a Sum, which is not ſufficient to ſatisfy the Judgments, and that he remains charged with them: On which the Plaintiff demurs, and the Caſe was argued at the Bar in *Michaelmas* Term, and alſo in this Term, and the Court took Time till *Eaſter* next, and then Judgment was given by the whole Court for the Plaintiff. And two Exceptions were taken to the Pleading. *Firſt.* The Concluſion *prout patet per ſeperalia Recorda inde* the ſaid ſeveral Judgments, where he ought to have concluded ſo to each ſeverally; but as it is pleaded it makes a complicated Iſſue: But by the Court, it is well enough, and it ſhall be taken as relating to each ſeverally, and the Plaintiff might have replied *Nul tiel Record* to each ſeverally. *Secondly*, It is not ſaid that the Judgments were had *pro veris & Juſtis Debitis*, as is uſual, and as eſpecially in this Caſe it ought to be, becauſe the Judgments here are by *Non ſum Informat'* in Actions of Debt, which lies not againſt Executors, and ſo has the appearance of Colluſion. But by the Court, it is well enough, for it ſhall come by Plea from the other Side, for if it were not *pro veris Debitis*, the Plaintiff might plead it and put the Defendant to prove the Truth of them, or he might plead Fraud and Covin, and put the Defendant to prove the Conſideration. *Thirdly*, It was ſtrongly argued for the Defendant, That Actions of Debt do not, lie againſt Executors on a ſimple Contract by the Teſtator; and therefore they who admitted Judgments againſt them in ſuch Actions, ſhould not have the Advantage of pleading thoſe Judgments which they might reverſe when they pleaſed, and which no other could avoid or reverſe, in Bar of juſt Debts; for by ſuch Means when they barred the Plaintiff of his Debt, they might afterwards reverſe thoſe Judgments, and ſo either relinquiſh or take back again the Money to their own Uſe. And to this Opinion did *Kelynge* the Chief Juſtice incline upon the firſt Argument in *Michaelmas* Term: Bnt afterwards in *Eaſter* Term following, he and *Twyſden* and *Wyndham*, and *Moreton*, all agreed, That Judgment ſhould be given for the Defendant; for though they might have abated the Actions, yet if they had ſo done the Plaintiffs might have charged them in other Actions on

S. C. 1 Sid. 332. Vaugh. 100. 2 Keb. 110, 120, &c. to 217. Vide 1 Danv. 721, 722 Stra. 407. 5 Com. Dig. 253.

Several Judgments pleaded, with one *prout patet per ſeperalia Recorda inde.*

Executor pleads Judgments, not ſaying *pro veris debitis*, yet good.

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Vide poſt. 261. 1 Sid. 404. Cro. El. 41. 1 Danv. 261.

Judgments per & con ra Executors. 1 Sid. 210, 332, 230. 2 Jo. 91. 1 Lutw. 662. Vaugh 89. Moor 678. 8 Co. 132. 2 Cro. 102, 184, 625.

9 Co. 108.
1 Roll. Abr. 922.
2 Brownl. 118, 153.
1 Mod. 33.
1 Lev. 134, 261, 281.
1 Sid. 210.
Cart. 221.
2 Mod. 36.
1 Lutw. 241.
1 Sid. 429.
2 Lev. 39.
3 Lev. 311.
Raym. 153.
Vaugh. 104.
Doug. 629, 421.
Cawp. 548.
Salk. 278.

on *Aſſumpſit*, and ſo put themſelves to a double Charge, which they are not to be obliged to do when the Debts are true and juſt, and in their Conſcience ought to be paid; and if they were not ſuch, the Plaintiff might by pleading have put them to prove the Truth of the Debts, either by pleading the Fraud or traverſing the Truth of the Debts, wherein if they failed the Plaintiff ſhould recover his Debt; and ſo there is no Room for the Suſpicion, That the Plaintiff ſhould reverſe the Judgments and retain the Money: And the old Books which held, That Actions of Debt did not lie againſt Executors on ſimple Contract, held alſo, That there was no other Remedy: But the Law is now otherwiſe, *viz.* That although Debt on ſimple Contract cannot be recovered againſt an Executor by Action of Debt, yet it may by *Aſſumpſit*. *Jones* and *Levinz* for the Plaintiff, and *Baldwin* and *Raymond* for the Defendant.

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* *Geary* againſt *Bearecroft*.

Tenant for another's Life, makes a Leaſe for Years in Truſt for himſelf for Life, and after in Truſt for his Wife, and dies, who ſhall be the Occupant, the Leſſee or the Wife?
S. C. 1 Sid. 346.
2 Keb. 148, 250, 285.
Cart. 57.
3 Peer. Will. 202.
2 Bac. Ab. 272.
Cruſe on Fines 287.

ERROR of a Judgment in Ejectment in the Common Pleas, where the Caſe upon a ſpecial Verdict was, Tenant for another's Life makes a Leaſe for Years in Truſt for himſelf for his Life, and after in Truſt for his Wife for her Life; The Leſſee for Years actually enters, but permits the Huſband to enjoy it, he dies, his Wife enters: And whether ſhe or the Leſſee for Years ſhould be Occupant, was the Queſtion. And it was adjudged in the Common Pleas againſt the Opinion of *Bridgman*, That the Wife ſhould be the Occupant. And thereupon Error was brought and aſſigned in the very Point, That the Leſſee ſhould be the Occupant; for the Huſband being but a *Ceſtuy que truſt*, was Tenant at Will to the Leſſee, and by his Death the Eſtate at Will determined, and the Eſtate actually reveſted in the Leſſee, who had once entered and been in the actual Poſſeſſion, ſo that he might maintain Treſpaſs before any actual Re-entry, the Law having caſt the Poſſeſſion upon him by the Death of the Tenant at Will; and 3 *Cro.* 182. *Dyer* 326. *b.* 2 *Cro.* 208, 554. *Litt. Sect.* 71. & *Co. Litt.* 62. *b.*

were

were cited. And to this Opinion *Kelynge* and *Moreton* inclined upon the firſt Argument. But on the other Side were cited 2 *Bulſt.* 11. *Chamberlain* and *Ewen*, *Litt. Sect.* 82. *Keilw.* 159, 165. That the Wife ſhould be the Occupant: And to that Opinion *Twyſden* and *Wyndham* inclined on the firſt Argument. And afterwards in *Michaelmas* 19 *Car.* 2. *Moreton* changed his Opinion, and by him, *Wyndham* and *Twyſden*, (*Kelynge* being abſent) it was ruled for affirming the Judgment *niſi*. The agreed, That they Leſſee might maintain Treſpaſs before the Entry, for by the Death of the Huſband the Tenancy at Will was determined, and the Eſtate reveſted in the Leſſee ſo as to maintain Treſpaſs before a Re-entry by the Poſſeſſion, which the Law caſts upon him. But it is one kind of Poſſeſſion for bringing Treſpaſs, and another to make an Occupancy, for none may be an Occupant but he who occupies and has the Poſſeſſion in Fact; And this Caſe was put and agreed, If Tenant for another's Life makes a Leaſe for Years to begin from his Death, and a Stranger enters, although the Stranger be Occupant for the Freehold, yet the Leſſee for Years ſhall enter upon him, and * ſhall hold it for his Term, and the Leaſe ſhall bind the Occupant. See 3 *Cro.* 182. according. * P. 203

The King againſt *Wetwang*.

INDICTMENT for taking out of his Pond certain Fiſhes called *Carp Fiſhes*, being of the Goods and Chattels of *J. S.* And an Exception was taken thereto, That it is not ſaid what Number of Fiſhes he took, which is ill in Indictments, as well as in Actions, 5 *Co. Playter's* Caſe; 'tis ill in Actions, and Indictments ought to be more certain than Actions, or at leaſt as certain, that ſo the Defendant may know to what he is to anſwer. But *Kelynge* and *Wyndham* over-ruled the Exception (and ſaid,) In Actions, Damages are to be recovered, not in Indictments, but the Party is to be fined at the Diſcretion of the Court, be it one Fiſh or more, according to the Circumſtances of the Fact, and not according to the Number of the Fiſhes. *Twyſden*

Indictment for taking certain Fiſhes called Carp Fiſhes, not ſhewing the Number, good. 2 Keb 178. 3 Burr. 336, 1233. Stra. 198, 1127. 6 Com. Dig. 355. Hawk P. C. 332.

den to the contrary, That Indictments ought to be as certain as Actions. But (*Moreton* being ſilent) the other two ruled the Party to plead to the Indictment.

Feltham againſt The Executors of *Harlſton* in Chancery.

Land deviſed to be ſold for payment of Debts, Goods in the Hands of Executors ſhall not be contributory, otherwiſe of Adminiſtrators.
1 Chan. Rep. 16, 129, 249.
2 Chan. Rep. 167, 155.
1 Chan. Rep. 199, 277.
V. 8 Co. 96.
Cro. El. 315.
2 And. 185.
Qw. 33, 124.
Cro. Car. 343.
Mar. 106.
2 Vent. 349, 342.
Went. 141.
Cro. Car. 363.
1 Salk. 296.
1 Term Rep. 690.

IN this Caſe 'twas ſaid by Serjeant *Fountain* to have been reſolved in this Court, and now admitted by the Maſter of the Rolls, he being only in Court, to be reaſonable, That if a Man deviſes Lands for Payment of his Debts, and makes an Executor, and leaves a perſonal Eſtate, that no Part of the perſonal Eſtate ſhall go to the Payment of the Debts, becauſe by the making of an Executor, the Teſtator's Intent appears, that the Executor ſhould have the Goods, for that the Teſtator had made another Proviſion for the Payment of his Debts. But if a Man diſpoſes of Lands for the Payment of his Debts, and after dies Inteſtate, the perſonal Eſtate ſhall be chargeable in the Adminiſtrator's Hands to the Payment of the Debts, for thereby either the moſt Part of the Land remains unſold for the Benefit of the Heir, or the moſt Part of the Money for which the Land was ſold, ſhall remain to the Heir, and no Intent appears that the Adminiſtrator ſhall have any thing.

* *Gardner* againſt *Fulforde.*

*P. 204

A *Quantum meruit* among other Thing, for four gilt *Pellices* for *Pelles*.
2 Keb. 154, 172
Vide 1 Sid. 445.
1 Mod 46.
2 Keb. 623.
1 Vent. 71, 106, 114.

ASSUMPSIT, That whereas the Plaintiff being an Upholſterer, had made for the Defendant, amongſt other Things, a Pair of Hangings, and had provided for him *inter alia quatuor pictas pellices* Anglice *gilt Skins* the Defendant promiſed to pay ſo much as he ſhould deſerve, and had not done it. After Verdict for the Plaintiff, 'twas moved in Arreſt of Judgment, That a Pair of Hangings is uncertain, not ſhewing what kind of Hangings, Silk, Tapeſtry, or what, and *Webb* and *Waſhburn*'s Caſe was cited in *Michaelmas*

1655. in *Style's Reports*. But the Court over-ruled this Exception, becauſe the Action here is only for the making of them, and not *Trover* to recover the Value in Damages. 2*dly*, That *quatuor pictas pellices*, is four painted Whores, (and *Pelles* is the Word for Skins;) and the providing of them for the Defendant is unlawful. And for this Cauſe, the Damages being entire, the Judgment was ſtaid on *Levinz*'s Motion for the Defendant.

Style 352, 353, 360.
2 Saund. 74.

Chapman againſt *Southwicke.*

ASSUMPSIT, That where the Plaintiff's Huſband was ſeiſed in Fee of ſuch a Meſſuage, and had made a Leaſe thereof to *Lodge*, and afterwards deviſed the Reverſion to the Plaintiff; and that *Lodge* dying, the Houſe was empty and locked up. And the Defendant pretending a Title thereto under *Lodge*, promiſed to the Plaintiff, That if he would conſent, that he ſhould enjoy it as *Lodge* had it, that he would become his Tenant as *Lodge* was, and pay the Arrears; and that he conſented, and the Defendant enjoyed, and had not paid ſo much due for Rent, Part before the Promiſe, and Part afterwards. After Verdict for the Plaintiff, 'twas moved in Arreſt of Judgment, 1*ſt*. That here is not any Conſideration; for it does not appear that the Plaintiff had the Poſſeſſion whereof to permit the Defendant to have the Enjoyment; nor that the Defendant had any Title, but that he ſo pretended. 2*dly*, That the Promiſe to become his Tenant as *Lodge* was, was not any Promiſe to pay the growing Rent; and for that he ought to have declared in Debt on the Leaſe, as Aſſignee of * *Lodge*. But by the Court, as to the firſt, The permitting him to enjoy it by the Deviſee of the Reverſion was a good Conſideration, whether he had a Title under *Lodge* or not; and if he had no Title, it is the ſtronger Conſideration. 2*dly*. The Promiſe to become his Tenant as *Lodge* was, extends to pay the growing Rent, as *Lodge* ought to have done, and the Action will lie on this expreſs Promiſe, notwithſtanding there be a Leaſe.

Promiſe if he would permit him to enjoy a Houſe as *Lodge* did, to become his Tenant as he was, a good Promiſe to pay the Rent. S. C. 1 Sid. 323. 2 Keb. 182.

* P. 205

Aſſumpſit lies on an expreſs Promiſe to pay Rent.

Lymbe

Lymbe *verſus* Hockly.

He got the Pox of a Yellow-haired Wench, actionable.

CASE for ſaying of the Plaintiff, *He has got the Pox of a Yellow-haired Wench in Moor-fields.* After Verdict for the Plaintiff, 'twas moved in Arreſt of Judgment, That ſaying, *one has got the Pox*, is not actionable, becauſe not Scandalous, it being intended the Small-Pox, 4 *Co.* 17. But 3 *Cro.* 214. laid of the Pox is actionable; and ſo is *rotted of the Pox*, 3 *Cro.* 648. becauſe intended the *French Pox*. But by the Court, it being here ſaid, That he had got them of a *Yellow-haired Wench*, 'tis actionable; for *Wench* in common Speech is taken for a Whore, and therefore it ſhall be intended the *French-Pox*. And *Twyſden* and *Moreton* held, That ſo it would be, if the Words had been, *That he had got them of a Yellow-haired Woman.*

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* P. 206

* Termino Paſchæ,

ANNO

19 Car. II. in Banco Regis.

Jenkins againſt *de la Grange.*

Court of Marches in *Wales*, where they may hold Plea of Dama-

A Prohibition was prayed to the Court of Marches in *Wales*, to ſtay a Suit there by Bill for Words, and tho' the Damages are laid to be under 50*l.* and they have Power by their Inſtructions to hold Plea, where

where the Damages are under 50*l.* yet that is to be intended in ſuch Actions, wherein they have uſed to hold Plea; and not in Actions whereof they have not uſed to hold Plea; and it was ſaid, That no Precedent could be produced where they ever held Plea in the Time of Queen *Eliz.* King *Jac.* 1. or *Ch.* 1. in any Caſe where the whole was to be recovered in Damages uncertain; for that would be to make a new Juriſdiction, for the Court there to be the Judges of the Damages by Bill, Anſwer, and Proofs of Witneſſes without a Jury; and ſo held the Court: But if any Precedents could be produced in Time of *E.* 6. or *H.* 1. *Eliz.* or *Jac.* 1. That they had held ſuch Pleas, that was to be allowed as by uſage on the Statute of *H.* 8. and their Inſtructions; and gave Time to ſearch for Precedents till *Trinity* Term; and then the Court not being ſatisfied on their moving of it again, the Court held their former Opinion, and ſaid further, That they could not hold (Plea of) Actions in Covenant or *Aſſumpſit*, where the whole Damages is uncertain; but in Covenant or *Aſſumpſit* to pay a certain Sum, they may hold Plea under 50*l.* And Day was given over till *Michaelmas* Term to ſearch Precedents, and then being not ſatisfied, they ordered the Plaintiff to declare, ſo that it might be determined on a Demurrer.

ges under 50*l.* or not.
S. C. 1 Sid. 323.
2 Keb. 183.

* *Stirke* againſt *Bates*.

* P 207

DEBT on Obligation, and lays the Action in *London*; the Defendant demands *Oyer* of the Condition, which was to perform Covenants in an Indenture, which was, That where the Earl of *Northampton* had granted to *Bates*, *Shrob-walk*, in the Foreſt of *Whittlewood* in this County, and the Soil and Ground of the ſaid Walk, and all Fees, *&c. Bates* by the ſaid Indenture granted it to *Stirke*, and appointed him Keeper and covenants, That he ſhould enjoy it; and the Defendant having ſo ſet out the Indenture, pleads Performance of all Covenants generally: The Plaintiff replies, That the Earl of *Northampton* having Title by Virtue of a Grant to him made before the Title of the

A Matter ſhall be tried in the County where the Iſſue ariſes on the new Statute, and not where the Action is laid.
S. C. 1 Sid. 325.
2 Keb. 187, 212. 216.
1 Danv. 456.
Vide 1 Mod. 37, 199.
2 Mod. 24.
3 Mod. 124.
6 Mod. 82.

5 Mod. 213. 1 Vent. 22, 100, 263, 272. 2 Lev. 121, 122, 164, 165. 2 Jo. 92. Raym. 392, 398. 3 Keb. 350, 371, 509. 1 Danv. 455, 456.

the Defendant, entered upon him and ousted him: The Defendant rejoins by Proteſtation, That the Earl did not enter, for Plea ſays, That the Earl had no Title: The Plaintiff ſurrejoins, That the Earl had Title, and ſo Iſſue is joined and tried by a *Venire Facias* from *Shrob-walk*, and Verdict for the Plaintiff. And now 'twas moved in Arreſt of Judgment, That a Walk in a Foreſt is not ſuch a Thing of which a Venue may be taken; 'tis not certain what it is, and it cannot be intended a Vill, it being only collaterally alledged in the Record as a Thing granted, and not as a Place wherein a Thing is to be done; and in Truth is no more than a Liberty or Office within a Foreſt; and the Venue ought to have been either of the Foreſt or of the Body of the County. And held by *Kelynge*, *Twyſden*, and *Moreton*: *Firſt*, That a Walk in a Foreſt is only a Liberty or Office whereof no Venue can ariſe. But hereof *Wyndham* doubted if it had been alledged as a Place where a Fact was done; but being only alledged as a Thing granted, and not a Place where a Fact is ſuppoſed to be done, 'tis not; whereto the other Judges agreed. But *Secondly*, It was held by the Court, except *Twyſden*, That it being tried by a Jury of the County where the Matter in Iſſue aroſe, it is within the new Stat. 16 & 17 *Car.* 2. of *Jeofails*, which although it ſays, *That it ſhall be good if it be tried by the County where the Action is laid*, yet it is to be underſtood within * the County where the Matter in Iſſue aroſe; for it would be to deſtroy the whole Law touching Juries, to try it in a County foreign to the Iſſue, which cannot know any Thing thereof; and the rather, for that the Statute ſays further, *That in ſuch and other like Caſes*, &c. And (therefore) here, although the Action is laid in *London*, yet it is well tried in the County of *Northampton*, where the Thing in Iſſue is. But *Twyſden* to the contrary, It is not within the Words, and the Statute being a new Law, is not to be taken by Intent contrary to the Words: But by the Opinion of the other three, Judgment was given for the Plaintiff; on which the Defendant immediately brought a Writ of Error, but afterwards the Parties agreed, and the Defendant gave the Plaintiff Satisfaction for the Breach of the Covenant. *Levinz* for the Plaintiff, and Serjeant *Wylde* for the Defendant.

A Walk in a Foreſt is only a Liberty, of which no Venue can ariſe. Stat. 16 & 17 Car. 2. cap. 8. Vide Stat. 4 & 5 *Anne*, cap. 16.

* P. 208

Pigge

Pigge againſt *Gardner.*

ERRORS were aſſigned of a Judgment in *Ely* Court, *Firſt*, for that in the Style of the Court it is not ſhewn whether it be held by Charter or Preſcription. *Secondly*, The Judgment is *Conſideratum eſt*, and not ſaid *per Cur: Thirdly*, The Writ of Inquiry of Damages is, *per Sacramentum duodecim*, &c. and not ſaid *proborum & legalium Hominum:* But all the Exceptions were over-ruled, for it being a Royal Franchiſe, it is not as in Caſe of inferior Courts: And afterwards this ſame Term in another Caſe between *Peacock* and *Bell*, in Error of a Judgment in *Aſſumpſit* in *Ely* Court, it was aſſigned, That it was not ſaid, That the Goods for which the Action was brought, were ſold and delivered within the Juriſdiction of the Court; and yet the Judgment was affirmed, becauſe it is not as in Caſe of Inferior Courts.

The Court of *Ely* is as a ſuperior Court. 1 Sid. 331. Vide ante 50. Poſt, 289. 1 Saund. 75.

Ergo, not ſaying *proborum & legalium hominum*, or *Vendit', &c. infra Juriſdictionem*, no Error. 1 Saund. 73. 1 Sid. 330. 2 Keb. 182, 226. 1 Sid. 87. Raym. 75. Ante 96. 1 Vent 243. 2 Lev. 87.

* *Norfolke* againſt *Elliott* in the Exchequer Chamber.

* P. 209

DEBT on an Obligation of 500*l.* dated 18th *July*, 13 *Car.* 2. conditioned, That if *Wogan*, now Priſoner in *Tenby*, renders himſelf Priſoner to the Plaintiff, Serjeant at Arms to the Houſe of Commons in Parliament, according to the Reſolves of the Houſe of Commons, to be void. The Defendant pleads the Statute 23 *H.* 6. and that *Wogan* was one of the Regicides guilty of the Murther of the late King *Charles* I. And that the Houſe of Commons being informed thereof, and that he rendered himſelf to the ſaid Houſe of Commons, according to an Order by them before made, they reſolved: That he ſhould be taken into Cuſtody by their ſaid Serjeant; and that the Plaintiff being Serjeant, took him into Cuſtody the 27th of *July*; and that afterwards, the ſaid 28th of *July*, the Obligation was made for Eaſe and Favour for delivering him out of Cuſtody. On which the

The Serjeant at Arms of the Houſe of Commons not within the Statute 23 H. 6. S. C. Raym. 62. Hard. 464. 1 Sid. 384. Poſt, 254. Ante, 86. 2 Lev. 103. 1 Saund. 61, 318. 1 Vent. 237. 1 Sid. 838.

Plaintiff demurs, and on Argument it was reſolved by *Hale* and the whole Court, That the Serjeant at Arms to the Houſe of Commons is not an Officer within the Statute of 23 *H.* 6. which extends only to Officers who have Execution and Return of the ordinary Proceſs of Law, and therefore the Serjeant to the Council of the Marches was not within it, as 1 *Cro. Car.* 309. *Johns* and *Stratford*'s Caſe. But 2*dly.* it was reſolved, that although it is not within the Statute, yet he being in Cuſtody for Treaſon, and that appearing upon the Record, the Obligation taken for his Enlargement, was void by Common Law. See *F. N. B.* 66. That no *Homine Replegiando* lies in ſuch a Caſe. 2 *Inſt.* 42. 43. it is not bailable except in *B. R.* 4 *Inſt.* 179. Bailing of one not bailable, is a negligent Eſcape. *Dy.* 324. A Bond for Eaſe and Favour to one in Execution, is void at Common Law. *Hob.* 14. 2 *H.* 4. 9. A Bond to deliver Goods taken in *Withernam*, is void; and *Plowd.* and 2 *Leon.* 107. the Statute pleaded, and the Bond adjudged void by the Common Law: And Judgment was given for the Plaintiff. *Levinz* for the Plaintiff, and *Turnour* for the Defendant.

Bonds for Eaſe and Favour to Traitors void at Common Law.
Ante, 86.
Poſt, 254.
1 Saund. 162, 318.
1 Sid. 96, 384, 838.
1 Vent. 237, &c.
2 Lev. 103.

* P. 210

* *Cannon* againſt *Abbot.*

ERROR of a Judgment in Treſpaſs, where the Action being brought againſt three, one pleads Not guilty, and thereupon Iſſue and Verdict for the Defendant; and Judgment by Default, and a Writ of Inquiry and Damages againſt the other two, and on the Judgment for the firſt Defendant, and the Judgment for the Plaintiff againſt the other two, they only bring a Writ of Error, and aſſign the want of an Original; and which although there be a Verdict in the Caſe, is not cured by the Statute, the Verdict being for the firſt Defendant, *&c.* and ſo ſet out the Caſe; and ſo it is as if the Action had been brought only againſt the other two. But if the Verdict had been for the Plaintiff againſt the firſt Defendant, this had been aided by the Statute; for the want of an Original as to all the Parties is cured when any Verdict is for the Plaintiff: And although the Writ of Error be brought by two without

Want of an Original not cured, where, in an Action againſt three, the Verdict is againſt the Plaintiff as to one, and Judgment by Default againſt the other two.

Three join in an Action, and Judgment againſt the Plaintiff as to one, and for him againſt the

without the third, it was argued to be good becauſe he cannot be joined, for he being acquitted, and the Judgment for him, he cannot ſay That the Judgment is to his Damage; and ſo held the whole Court, except *Twyſden*, who held, That the Writ of Errror ought to have been brought by all three.

others, they may bring Error.

Butler againſt *Hedges.*

ERROR of a Judgment in Treſpaſs in the Common Pleas, where the Plaintiff laid the Treſpaſs the firſt of *April*, of the taking of ten Loads of Wheat, ten Loads of Barley, ten Loads of Oats; with a *Continuando* of the ſaid Treſpaſs, from the ſaid firſt of *April* to the firſt Day of *June*. And the Error was aſſigned in this, That the Treſpaſs being laid that he took them the firſt of *April*, and ſo all at one Day, the *Continuando* was ill; for what was done the firſt of *April*, cannot be done at another Day afterwards. But he ought to have declared of ſo many Loads taken and carried at one Day, and ſo many at another, *&c.* and divers Authorities were cited to this Purpoſe; and among others the Caſe of *Whitchcote* and *Elliot* in this Court, *Mich.* 16. *Car.* 2. In Treſpaſs for laying logs of Wood in his Land the firſt of *April*, *continuando* till the firſt of *May*, and for this Judgment was arreſted. But (notwithſtanding) * upon View of the Book, 21 *H.* 6. 20. the Judgment was affirmed; and it was ſaid, That even in the Caſe of *Whichcote*, Judgment was afterward given for the Plaintiff: But it was agreed, That for the doing of a ſingle Act, which is to be done all at one Time, as killing a Horſe, *&c.* there the *Continuando* is ill. But of divers Things which may be done at divers Times, as here, although that the Treſpaſs be at firſt laid to be done on the firſt Day, the *Continuando* ſhall make a Diſtribution thereof, that Part was done at one Day, and Part at another within the Time (declared of;) and the Judgment was affirmed.

Treſpaſs for taking Goods 1 *Aprilis*, with a *Continuando* til 1 *Junii*. S. C. 1 Sid. 319. Vide 2 Keb. 173, 203, 215. 6 Mod. 38. 1 Sid. 319. 2 Show. Caſe 429.

Vide 1 Sid. 224, 249. 1 Vent. 363, 224, 249.

* P. 211

1 Sid. 224, 249. 2 Jon. 194. 1 Vent 363. 1 Keb. 786.

Alanſon againſt *Butler.*

A *Committitur* is to be pleaded *prout patet per Record'*, otherwiſe of Writs.
S. C. 1 Sid. 330.
Nelſ. Lutw. 402, 405.
2 Jon. 21.
2 Keb. 189, 206.
V. Style 256.
2 Jon. 21.
Hob. 202.
1 Leon. 78.
2 Leon. 96.

A *Scire facias* for Execution of a Judgment: The Defendant pleads, That he was taken on an Execution on this Judgment, and brought to the Bar, and acknowledged to be in Execution, and afterwards was voluntarily permitted by the Sheriff to eſcape. Onwhich the Plaintiff demurred and had Judgment: 1. For that he did not conclude the *Committitur prout patet per Recordum*, for it is Matter of Record, and ought to be ſo pleaded: But Writs need not to be ſo pleaded, though they are Matters of Record, becauſe they may be amiſs, and perhaps were never returned. 2*dly*. That a voluntary Eſcape by the Goaler without the Plaintiff's Aſſent, ſhall not prejudice the Plaintiff, but that he may bring a new Execution; as 1 *Cro. Mounſon* againſt *Clayton*, and *Robinſon* againſt *Clayton*; and ſo it was adjudged in this Court, *Mich.* 19 *Car.* 2. between *Simpſon* and *Hunt*: But *Trin.* 21. between *Crane* and *King*, it was doubted, and the Court divided in that Caſe, which ſee entered, *Paſch.* 20 *Car.* 2. in the Common Pleas, *Rot.* 865.

The Sheriff permits a voluntary Eſcape. the Plaintiff may have a new Execution.

* P. 212

* *Cooke* againſt *Gerrard.*

Deviſe of part of the Lands to *A.* for Life, and another Part to *B.* for Years, and then deviſes all his Lands not deviſed, the Reverſion paſſes.
S. C. 1 Saund. 180.
2 Keb. 206, 207, 224.
Cro. El. 152. 524.
2 And. 59.
Ow. 155.
1 Leon. 180.
Al. 28.
2 Vent. 285.
1 Mod. 187.

EJECTMENT, and a ſpecial Verdict; *Robert Keepe* ſeized of *Spains-Hall*, ſettles part thereof on his Daughter for Life; and afterwards by Will deviſes the Houſe to his Wife for a Year after his Death; and then deviſes all his Lands, not ſettled or deviſed, to *Thomas Keepe, Habend'* to him and his Heirs, after a Year after his Death, and after the Death of his Daughter; and dies: The Year after his Death is expired, and the Daughter is yet alive, and *ſhe* brought the Ejectment for the Houſe, and whether it lies during the Daughter's Life, was the ſole Queſtion argued at the Bar; for it was admitted, That although the deviſe be of the *Lands* not deviſed or ſettled, and no of the *Eſtate* not deviſed or ſettled, yet the Reverſion will paſs by the Deviſe of the Land, although the Land itſelf was ſettled and deviſed before; and it ſhall be taken for the Reſidue of the Eſtate in the Land. And

it

it was reſolved, That the Eſtate of the Houſe ſhould paſs immediately after the Year after the (Daughter's) Death ended, and ſhould not tarry till both Parts of the Copulative are determined, *viz.* till after the Year, and after the Death of the Daughter, but ſhall be taken diſtributively, *viz.* That the Houſe ſhould paſs immediately after the Year ended, and the Reſidue after the Death of the Daughter; and *Gilbert* and *Wittie's* Caſe, in 2 *Cro.* 655. 3 *Cro.* 199. and *Wyndham's* Caſe in 5 *Co.* were cited.

3 Mod. 228.
2 Vent. 363.
1 Salk. 236.
6 Mod. 118.
Ante 130.
V. 3 Lev. 259, 260.
2 Saund. 197.
4 Danv. 527.

Pemble againſt *Sterne.*

EJECTMENT, and ſpecial Verdict: The Archbiſhop of *York* ſeiſed in 1604. made a Leaſe rendering the ancient Rent; in 1630. this Leaſe was ſurrendered, and the Land remained unlet till 1662. when the Archbiſhop made a Leaſe thereof to the Leſſor of the Plaintiff, rendering the ſame Rent which had uſed to be reſerved thentofore, when it was demiſed in 1604. and dies; the now Archb. *Sterne* enters, and makes a Leaſe to the Defendant * his Daughter, againſt whom the Plaintiff brought Ejectment. And the only Queſtion argued at the Bar this Term was, Whether the Leaſe made in 1662. the Lands not having been demiſed before, ſince 1630. was good within the Statute 32 *H.* 8. it not having been demiſed nor any Rent reſerved for the greater Part of twenty Years before the making thereof? And afterwards in *Hillary* 19 & 20 *Car.* 2. it was argued at the Bench by all the Judges, and *Kelynge* and *Twyſden* held the Leaſe good; for the Intent of the Statute was to preſerve the Revenue only, which ſhall not be diminiſhed againſt the Succeſſor after the Statute, and here the moſt ancient that could be known is reſerved, and probably the very Rent which was reſerved at the Time of the Statute, or more: And if it be not demiſable, when it has been undemiſed for eleven Years, it would be in the Power of the Predeceſſor to do a Prejudice to the Succeſſor by retaining the Land in his Hands for eleven Years; and ſo enforcing the Succeſſors for ever after to keep the Lands in their own Manuring, which would be

Biſhops Lands not demiſed for the moſt part of the laſt 31 Years, if they may be demiſed afterward.
8. C. 1 Sid. 316, 416.
Raym. 165.
* P. 213
2 Keb. 213, &c.
1 Danv. 752, Pl. 5 754. Pl. 8.
V. Sty. 194.
11 Co. 55.
1 Rol. Rep. 55.
Bridg. 56.
Hard. 133.
&c. infra.

be a great Inconvenience: Alſo for theſe laſt twenty Years, during the War and the King's Expulſion, great Part of the Biſhops Lands have been unletten, and by this Means they would never be demiſable again, if the Law ſhould be ſo: But *Wyndham* and *Moreton* held the contrary, That it not having been demiſed for eleven Years (the greater Part of the twenty-one Years before) it is now demiſable again; and cited *Co. Litt.* and 3 *Cro.* 707. *Mallett* againſt *Mallett*; and *Harper's Reports*, Sir *John Manning's* Caſe. And if it be a Miſchief, it ought to be remedied by Act of Parliament, and not by the Court here. But afterwards *Hillary* 20 & 21 *Car.* 2 *Wyndham* being dead, *Kelynge* and *Twyſden* gave the Rule for Judgment for the Plaintiff (the Record not being tranſmitted to the Exchequer-Chamber, as was intended and directed) *Niſi*. And afterwards it was ſhewn in order to ſtay Judgment; 1. That the Ejectment is among other Things *de Pannagio*, whereof an Ejectment does not lie, for *Pannagium* is but a Privilege of taking Pannage. And 2*dly*. It is of the fourth Part of a Meadow, not ſhewing the Number of the Acres the Meadow contains. And thereupon the Judgment was ſtaid.

Ejectment lies not *de Pannagio*. V. ante 58, 114. 1 Sid. 16. 1 Co. 25. b. Hard. 57, 58. Pal. 415. Noy. 86, 109, 121.

Nor for the fourth Part of a Meadow, without ſhewing how many Acres. 1 Rol. R. 55. Hard. 57. &c. Hetl. 146. 2 Brownl. 142. Godb. 157. Cro. Jac. 146, 654. Pal. 337, 413, 102.

* P. 214

* The King againſt *Sims* and his Wife.

Return of a Reſcue, where it is to be out of the Sheriff's Cuſtody, and where out of the Bailiff's. S. C. Raym. 161. 1 Sid. 332. 2 Keb. 217. V. 2 Lev. 28, 144.

EXCEPTION taken to the Return of a Reſcue, becauſe it is, That they reſcued the Priſoner out of the Hands of his Bailiffs, where it ought to be, *out of my Cuſtody*, where the Arreſt is made by the Sheriff's Bailiff; otherwiſe where it is from the Cuſtody of a Bailiff of a Liberty, who has the Return of Writs, for there it ought to be *extra cuſtodiam Ballivi libertat'* who has the Return of all Writs, &c. And for this were cited *Sty.* 417. 3 *Cro.* 781. *Dy.* 241. *Latch*, 184. and of this Opinion was *Kelynge*, Chief Juſtice: But *Twyſden* and *Wyndham* on the contrary, ſaid, There is *veritas Facti*, & *veritas Legis*; and here the Return is of the Verity of the Fact, which is as well as the Verity of the Law, *viz. his own Cuſtody*; and each of thoſe Ways is good. 2*dly*. It is not returned, that they

Reſcue *extra Cuſtodia*, not ſaying he was in Cuſtody is ill,

they reſcued themſelves, or, Who reſcued them? 3*ly*, It is not expreſly ſaid, That they were in the Bailiff's Cuſtody, but only by Implication, *viz.* That they were reſcued out of the Bailiff's Cuſtody; and for theſe two the Judges agreed, That it ſhould be quaſhed, and ſo it was.

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* Term. Sanct. Trin. * P. 215

ANNO

19 Car. II. in Banco Regis.

Keightly againſt *Buckly*.

DEBT was againſt an Aſſignee for Rent for three Years, due at *Lady Day*, 1664. The Defendant pleads, that before *Lady Day*, 1664. *viz.* the firſt of *June*, 1661. he aſſigned over the Term: The Plaintiff demurs, whereupon the Queſtion intended was, Whether an Aſſignee by Aſſigning over be diſcharged from the Payment of the Rent, without acceptance of the Rent, as the Leſſee himſelf is not? But two Exceptions were taken to the Plea, as to the manner of it. *Firſt*, That no certain Time is alledged of the Aſſignment, but only before *Lady Day*, 1664. and that may be for a Year or two after the Rent was arrear; and that which comes after the *ſcilicet* 1 *Junii* 1661, is not traverſable;

An Aſſignee aſſigns over. Q. If diſcharged from paying the Rent without the Leſſor's Acceptance? S. C. 1 Sid. 338. Raym. 162. 2 Keb. 260, 277. 2 Lev. 295. Vide 1 Salk. 81. contra. 1 Inſt. 41. 1 Leon. 127.

traverſable: But he ought to have pleaded, that he aſſigned before any Rent (due) *viz.* ſuch a Day. *Secondly*, It is not pleaded that he had given Notice of the Aſſignment to the Leſſor; and till Notice and Tender of the Arrears, he cannot by Aſſignment diſcharge himſelf of the Rent, no more than in the Caſe of Lord and Tenant. *Twyſden* held the firſt Exception good, but the contrary of the ſecond; for the Aſſignee is not chargeable but in reſpect of the Privity of the Eſtate, which by the Aſſignment is gone, whether there be Notice or not: And ſo differs from the Caſe of a Leſſee, who notwithſtanding the Aſſignment, remains chargeable on the Privity of Contract, till by Acceptance of another Tenant he be diſcharged. *Kelynge* and * *Wyndham* held both Exceptions to be good: And Judgment was given for the Plaintiff by all the three.

Aſſignment by an Aſſignee without Notice, not good. Vide poſt, 270, 271. 3 Will. 534. Cowp. 303.

* P. 216

Low againſt *King*.

TRESPASS and Impriſonment laid the firſt of *May* 17 *Car.* 2. The Defendant juſtifies as Sheriff of *Coventry*, to arreſt him for a Breach of the Peace made upon him in the Execution of his Office; for which he arreſted him and carried him before the Mayor, and traverſed all the Time before he was Sheriff, or afterwards; and the Traverſe was adjudged good, though it was objected to be too large.

Traverſe the whole Time, before he was Sheriff or after.

Wright againſt *Wrainſcott*.

TRESPASS for killing the Defendant's Maſtiff Dog: The Defendant pleads, That the Plaintiff's Dog fell upon and bit the Defendant's Dog, which he kept for the Defence of his Houſe, wherefore in Defence of his own Dog, he killed the Plaintiff's Dog; on which the Plaintiff demurred, and the Plea was adjudged ill; for that he does not ſay that he could not otherwiſe ſave his own Dog without killing the

Juſtifies the killing of a Maſtiff, becauſe he bit the Defendant's Dog. S. C. 1 Sid. 336. 1 Saund. 84. 2 Keb. 237. Nelſon's Lutw. 481. Vide 2 Lev. 28, 227. Ray. 86. 5 Com. Dig. 86, 99. 3 Bac. Abr. 519. Bul. Niſi Prius 17. 1 Term Rep. 479. H. Bl. Rep. C. B. 556.

Plaintiff's

Plaintiff's Dog, and a Maſtiff is valuable. *Secondly*, It does not appear that the Plaintiff's Dog was uſed to bite, nor that the Defendant's Dog was a Maſtiff.

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Whitfield againſt *Holmes* and his Wife.

THE Feme whilſt ſole entered into an Obligation to the Plaintiff, and afterwards married the Defendant, and Debt being brought againſt her, and ſhe being in Priſon and the Plaintiff afterwards knowing of the Marriage, brought another Writ againſt the Huſband and Wife, and took the Huſband alſo; and both being in Cuſtody of the * Marſhal, he declared againſt both. But the Court on Motion diſcharged the Wife for the Huſband only is to be impriſoned, but before he be diſcharged, he ſhall find Bail both for himſelf and his Wife.

A Feme covert diſcharged, the Huſband finding Bail for her. 1 Vent. 49. 1 Mod. 8. 1 Sid. 21. * P. 217 2 Cro. 445. 1 Roll. 983. Litt. Rep. 18. 6 Mod. 301. 1 Mod. 8. 3 Wilſon. 124.

Ld. Raym. 73. Str. 1167, 1237, 1272. 3 Bac. Abr. 751. 2 Blac. Rep. 720. 1 Term Rep. 486.

Thomas againſt *Sorrel*.

DEBT for 450*l.* on the Statute of 12 *Car.* 2. for ſelling Wines without Licence, and demanded the 450*l.* For that the Defendant at fifty ſeveral Times, ſold Wine in his Houſe, being a Tavern, not being licenſed according to the Statute of 12 *Car.* 2. for which he forfeited 5*l.* for each Time; and on *Nil debet* pleaded by the Defendant, a Special Verdict found the Statute of 7 *E.* 6. touching the ſelling of Wines, That none ſhould ſell without Licence according to the ſaid Act: Then they found the Patent 9 *Jac.* 1. whereby the King incorporates the Vintners of *London*, and grants for himſelf, his Heirs and Succeſſors, That it ſhould be lawful to the Maſter, Wardens and Freemen of the Commonalty of Vintners, (that being the Name of the Corporation) and their Succeſſors, and all who ſhould be Free of the ſaid Company, *To ſell Wine. Firſt*, Within *London*, and three Miles thereof. *Secondly*, In all Cities and Port-Towns in *England*. *Thirdly*, In all other Cities and Thoroughfare Towns on the Road, between

King *James* the Firſt granted to the Vintners of *London*, Liberty to ſell Wines without Licence; this does not determine by his Death. S. C. Vaugh. 330. Hard. 443. 464. 2 Keb. 245, 280, 322, &c. to 790. 3 Keb. 76, 119, 143, 155, 184, 223, 264.

between *London* and *Dover*, and *London* and *Berwick*, where any of the Company ſhould inhabit, and to keep Taverns and ſell Wines by Retail, notwithſtanding the Statute of *E.* 6. or any other Statute made or to be made. Then they found the Statute of 12 *Car.* 2. *c.* 25. whereby it is enacted, *That no Perſon ſhall ſell Wines by Retail, except he be enabled according to that Statute*; and directs how the King ſhall nominate Commiſſioners for granting Licences, and thereupon reſerves a Revenue to the King; *Provided that this Act ſhall not be prejudicial to the Maſter, Wardens, Freemen and Commonalty of the Vintners of* London, *but that they may uſe and enjoy ſuch Liberties, as they have heretofore lawfully uſed.* And (they found) That the Defendant was a Freeman of the Vintners Company, and kept a Tavern at *Stepney*, within three Miles of *London*, and ſold Wine by Retail
* P. 218 at the ſaid *Times. And if he were indebted for the ſaid Times, they found for the Plaintiff 5*l.* and if not, *&c.* then for the Defendant for the Whole. This Caſe after divers Arguments in the King's Bench, was for the Weight and Difficulty of the Caſe adjourned into the Exchequer-Chamber, and it was there twice argued at the Bar; *Firſt*, By *North* the King's Solicitor for the Plaintiff, and *Levinz* for the Defendant, and at another Day by *Finch* the King's Attorney; and (a new Judge being made) by *Levinz* again for the Defendant; and for the Plaintiff three Points were principally made. *Firſt*, That the Patent of King *James* I. with the *Non obſtante*, was never good in its Creation. *Secondly*, If it ever was good, yet it was determined by that King's Death. *Thirdly*, That the *Proviſo* in the Statute of 12 *Car.* 2. does not enable the Defendant to ſell without a Licence: And upon the firſt Point they objected, That the Patent was never good, *Firſt*, In reſpect of the Perſons to whom, *viz.* a Corporation which was not ſubject to a Uſe, and therefore not capable of ſuch a Truſt as for making whom they pleaſed Free of their Company; or to make them exempt from the Law, and in Effect to give to them a delegative Power, for exempting whom they would from the Law, and by this means delegate an Exemption to any other Perſon whom they ſhould make Free of their Company; which the King himſelf could not do. See 7 *Co.* the Caſe of Penal Laws, and *Co. Entr.* 370. *Secondly*, For that the Grant was for ever,

ever, and ſo not good in Point of Time. *Thirdly*, That it was void in reſpect of the Places, extending over a great Part of the Realm; alſo a Diſpenſation is a provident Relaxation of the Law, by Reaſon of ſome weighty Neceſſity. See 11 *Co.* 88. *a.* 7 *Co.* 37. As to the ſecond Point, they ſaid, *Firſt*, That this is only a Licence to do a Thing contrary to a Penal Law; and all Licences, Commiſſions, *&c.* determine with the Death of the Donor, and cited *Latch* 170, 171. and *Dyer* 190. *Secondly*, It was ſaid to this Point, That thoſe Diſpenſations are Prerogatives of the King, which he cannot grant ſo as to bind his Succeſſor; for they ought not to be granted, but for ſome weighty or urgent Neceſſity, and the Predeceſſor King cannot know what ſhall be neceſſary or prudent for the Succeſſor to do. And to the third Point they ſaid, *Firſt*, That the *Non obſtante* in the Patent of King *James*, cannot diſpenſe with the Statute of *Car.* 2. made ſince, notwithſtanding thoſe Words, *any Statute made or to be made*; which was agreed. And *ſecondly*, * That the *Proviſo* in the Statute of 12 *Car.* 2. ſhall not enable them to ſell Wine without Licence, for it ſaves to them only ſuch Liberties as they before lawfully uſed. And the Patent of King *James* does not make their ſelling of Wines lawful, but only excuſes them from the Penalty and Forfeiture, which they would incur by the Statute of 7 *Ed.* 6. For the Act of *Ed.* 6. makes the Thing illegal by the reſtraint, and puniſhable; and the Patent of King *James* diſpenſes only with the Penalty and Forfeiture, and does not make the Thing legal againſt the Body of the Statute of *Ed.* 6. and altho' the keeping of Taverns was a Trade before the Statute of *E.* 6. yet it was conſidered as a Trade that introduced Irregularities and Diſorders, and the Statutes of *Ed.* 6. and *Car.* 2. were made for the Common Good to prevent thoſe Diſorders, as divers Laws before had endeavoured to do. See old *Magna Charta* 24, 25, 115, 151. It was one of the Articles in *Eyre* to enquire of falſe Meaſures in Taverns, and the Judgment of the Pillory, Statute 4 *E.* 3. *c.* 12. 27 *Aſſ.* 24. and divers Statutes were made for redreſs of Diſorders in Taverns, as 5 *R.* 2. 7. 6 *R.* 2. 7. 3 *H.* 8. 8. 22 *H.* 8. 7. 28 *H.* 8. 14 *&* 18 *E.* 2. of the View of Frank Pledge. But on the other Side, it was ſaid as to the firſt Point, That the Patent was good in its Creation;

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But to this it was anſwered, That thereof was no Illegality, but only an abuſe of the Trade might be inferred, for ſo are many other Statutes made againſt other Trades, as 51 *H.* 3. the Statute *Panis & ſervifia* to regulate Bakers and Brewers, *&c.* and lately divers Statutes to regulate the Trades of Clo-

thiers, Tanners, Dyers, &c. which only prove the ill Uſe, but not the illegality of the Trades, elſe the Parliaments would have taken away the Trades themſelves, and not the Abuſes only.

Creation; and to the firſt Objection, That the Grantees being a Corporation, were incapable of ſuch a Corporation, were incapable of ſuch a Truſt, it was anſwered, That they are the more capable of ſuch a Truſt by being a Corporation: Corporations are intruſted with the Government of Places where they are, as Mayors and Commonalties; and the Statute of *Ed.* 6. puts the Power of licenſing Taverns in the Corporations of ſeveral Towns. Alſo Corporations aggregate never die or change, as natural Men do, and therefore the Prudence of entruſting them is always the ſame (*i. e.* unchangeable.) And this is no more a Delegation of a Power than when the King makes a Corporation, and grants, That the elder Aldermen ſhall be Juſtices of Peace (which he does every Day) is a grant of a Delegative Power to make a Juſtice of Peace; but it is included in the Grant itſelf; as a Grant to a Man and his Heirs, the Heir is not in by Delegation of the Anceſtor, but included in the Grant. The King cannot grant to a Corporation a Power to make Juſtices of Peace. But when the King grants to a Corporation that their Aldermen ſhall be Juſtices of Peace, they are ſo by Virtue of the Grant itſelf, when they become Aldermen, and not by the Delegation of * thoſe who elected them Aldermen, 20 *H.* 7. 6. 1 *H.* 4. 5. Stat. 27 *H.* 8. 24. 21 *E.* 4. 56. *Yelv.* 13. And as to the Time of its enduring, it is more than for Life, *viz.* for ever; ſo are all Grants to Corporations to purchaſe in *Mortmain* perpetual, and do not determine by the King's Death, nor are they reſtrained to any Time. And in *Bridgman*'s *Reports*, *Allen* againſt *Newton*, a Licence was granted on this ſame Statute to one for Life, Remainder to another for Life. And ſo in *Hilary* 1659. *B. R. Young* againſt *Wright*, a Licence was to the Father and his Aſſigns, Remainder to the Son and his Aſſigns for Life, and held good; for by the Diſpenſation, there paſſes not only an Authority, but alſo an Intereſt by way of Reſtitution to that which was their Right before the Statute made. And the Grantees of Wine-Licences have always aliened and aſſigned them from one to another, with their Houſes wherein the Taverns are kept. And as to the ſecond Point, it was argued (agreed,) That Commiſſions, Authorities and Patents, which are no more than Licences, do determine

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mine with the King's Death. But in this Caſe, the Grant and the *Non obſtante* do not operate only as a Licence, but as the Reſtitution of an Intereſt, *F. N. B.* 223. *G.* A Licence to alien in *Mortmain*, does not determine by the Death of the King, the Grantor, *Plowd.* 457. *b.* and 2 *R.* 3. 4. The King grants to an Abbot, That he ſhall not be a Collector of the Tenths; (a Tax) it ſhall bind the Succeſſor, becauſe it operates as a Diſcharge executed, and not as a Licence Executory. See *Dyer* 54. A Licence on this Statute to one and his Aſſigns; and *Bridgman* 113. and the Caſe of *Young* and *Wright*, 3 *Cro.* 77. before cited, and in *Trinity* Term 2 *Jac.* 1. in the Common Pleas, *Norris* againſt *Maſon* and *Hill*. 2 *Jac.* 1. in the King's Bench, *Might* againſt *Norton*, in an Information on the Statute of *Ed.* 6. ſuch a Patent was made by Queen *Elizabeth*, and confirmed by King *James*; and upon a Demurrer, Judgment was for the Defendant, which ſhews that the Patent did not determine by Queen *Elizabeth*'s Death; for if ſo, the Confirmation by King *James* of a Patent, which was become void, had been alſo void: Which Caſes were the ſame Year, *viz.* the ſecond of King *James*, as the Caſe of Penal Statutes, which is the ſame Caſe with Sir *Walter Raleigh*'s, and *Co. Entr.* 37*c.* proves, That the Court took a diverſity between this Patent and the Patent to Sir *Walter Raleigh* to diſpenſe with Penal Laws. And as to the third Point, when the ſaving in the Statute ſaves to the Vintners * of *London* all the Liberties which they had lawfully uſed, it ſaved to them the Liberty of ſelling Wines without Licence, for when they by the Patent of King *James* (were exempted from the Penalties of) the Statute of *Ed.* 6. they ſold Wines lawfully, and there is nothing elſe to be ſaved to them. And of this Opinion, as to this (laſt) Point, were all the Judges, except Baron *Thurland*, who held, That the Patent of King *James* ſaved them only from the Penalties and Forfeitures given by the Statute of *Ed.* 6. but did not make the ſelling of Wines lawful. And the Caſe having been argued at the Bench ſeveral Days in *Eaſter* and *Michaelmas* Terms, 26 *Car.* 2. *viz.* Two Judges on each Day, Judgment was ruled to be given for the Defendant. And on the firſt Point, Baron *Thurland*, and *Wyndham*, and *Ellis*, Judges in the Common Pleas, and

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and *Turner*, Chief Baron, held, That the Patent of King *James* was not good, and grounded themſelves much upon the Reaſons before alledged. But all the other Judges, *Hale* and *Vaughan*, Chief Juſtices, *Twyſden*, *Wylde* and *Rainsford*, Judges of the King's Bench, *Atkyns* of the Common Pleas, and *Turner* and *Littleton*, Barons of the Exchequer, held, That the Patent was good in its Creation. And as to the ſecond Point, *Wyndham* and *Ellis* held, That if the Patent was ever good, it did not determine by K. *James*'s Death; and with them agreed *Hale*, Ch. Juſtice of *B. R.* and *Vaughan*, Ch. Juſtice of *C. B.* and *Twyſden*, *Rainsford*, *Wylde*, *Atkyns*, Baron *Turner* and *Littleton*; but the Chief Baron *Turner* and *Thurland* held, That tho' it had been good in its Creation, it was notwithſtanding determined by the King's Death. And as to the third Point, they all as before, except *Thurland*, agreed, That the *Proviſo* in the Statute of 12 *Car.* 2. exempted the Vintners of *London* out of the Statute, becauſe it was a Privilege lawfully uſed by them before the Statute: And thereupon the Record was ſent back into the King's Bench, and there, on the Motion of *Levinz*, Judgment was entered accordingly.

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* *Downs* againſt *Beck*.

Conſideration to forbear ſuing one as Adminiſtratrix. good. *Ut* an Affirmative, and not Similitudinary. S. C. 1 Sid. 337. 2 Keb. 249, 253.

ASSUMPSIT, in Conſideration that the Plaintiff would forbear to ſue the Defendant as *Adminiſtratrix* of *J. S.* who died indebted to him, till he the Defendant had married ſuch a Woman to pay him; and ſays, That he had forborn, and that the Defendant had married the Woman. After Verdict, it was moved, That it is not alledged that the Defendant was Adminiſtratrix, and ſo the forbearance of ſuing her is no Conſideration, for *ut* (as) is no Affirmative, but only Similitudinary, and *Jones* cited *Paſch.* 1653. *B. R. Rot.* 196. in *Style's Reports* 405. to be ſo adjudged, whereupon the Judgment was ſtaid: But afterwards on a ſecond Motion, it was adjudged for the Plaintiff, for *ut* (as) is an Affirmative, as a Diſcent to one *as* Son and Heir, is an Affirmative that he is Son and Heir.

Pit

Pit againſt *Knight.*

DEBT on an Obligation in *Briſtol*, where the Defendant pleaded in Bar a Judgment on the ſame Obligation, in *B. R.* and this he is ready to verify by that Record remaining in *B. R.* The Plaintiff replies, No ſuch Record, and thereof demands Judgment, and his Debt aforeſaid to be adjudged to him: The Defendant rejoins, *That there is ſuch a Record, and this he is ready to verify by that Record*; but pleads further, *That he cannot have the Record out of the K. B. and thereupon demands Judgment, Whether the Court at* Briſtol *would further proceed:* And the Court there gave Judgment againſt the Defendant for failing of the Record; and now two Errors were aſſigned *viz. 1ſt.* That the Plaintiff in his Replication did not demand any Damages, but only his Debt, and yet the Court there had given him Damages alſo. But by the Court, The Demand of the Judgment is ſufficient, for when the Court gave him Judgment, they ought to have given him Damages alſo, as incident thereto. *2dly.* That the Court there ought not to have given him Judgment on the Failer of the Record, at leaſt, not without a Demurrer on the Plea, But the Court affirmed the Judgment.

In Debt on an Obligation in the Court of *Briſtol*, a Judgment in *B. R.* on the ſame Obligation pleaded. S. C. 1 Sid. 329. 1 Saund. 97. 2 Keb. 208, 249, 278. 1 Danv. 789. pl. 5.

A Replication demands Judgment and his Debt, but not Damages, yet the Court gave Damages. Vide 2 Lev. 19. Cro. Car. 297. 4 Inſt. 73. 2 Com. Dig. 17. 2 Atk. 317. 1 Saund 97, 99. 2 Hawk. P. C. 9. V. 1 Saund. 99.

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**Note* this, For hereby it ſeems that the Record might have been removed out of *B. R.* by *Certiorari*, and then ſent by *Mittimus* to this inferior Court. (*Quere.*)

Verni qui tam againſt ——— In the Exchequer Chamber.

DEBT on the Statute of King *James* I. touching Leather, and upon an Iſſue tried at the *Guild-hall*, the Jury not being full a *Tales* was prayed: But it was objected for the Defendant, that it cannot be without a Special Warrant by the Attorney General. But by *Hale*, It may well be in this Caſe without Warrant, by Reaſon of the Intereſt which the Proſecutor has; otherwiſe in Indictments, *&c.* which are the Suits of the King himſelf.

A *Tales* without Warrant in Informations, but not Indictments. Bull. N. P. 305.

Term.

Term. Sanct. Mich.

ANNO

19 Car. II. in Banco Regis.

Combers againſt *Watton*.

Debt againſt the Heir in the *Detinet*, cured by Verdict. S. C. 1 Sid. 342. 2 Keb. 259, 290, 302. Vide ante 127, 130. Hob. 282. Dyer 344. 5 Co. 36. 3 Lev. 74. Stra. 304, 1076, 1217. 2 Wilſ. Rep. 50. Cowp. 128.

DEBT againſt the Heir on an Obligation of his Anceſtor, in the *Detinet* only: And after Verdict it was moved, That it ought to be in the *Debet* and *Detinet*; and ſo held the Court at firſt, but it was afterwards reſolved to be cured by the *Oxford* Act of *Jeofails*, being after Verdict; and though not by the particular Words in the Statute, yet it is by thoſe general Words, *and other like Caſes*. *2nd Exception*. That the Defendant appeared by Guardian, and it does not appear that he was within the Age of twenty-one Years, nor is the Guardian ſaid to be admitted by the Court; and thereupon it was ſtayed: But it was ſaid by the Court, That if the Guardian-piece could be found, and it is entered ſo there, the Court would amend the Declaration thereby.

Guardian not ſaid to be admitted by the Court.

Dethicke againſt *Caravan*.

A Deviſe of Lands to be ſold by Executors. Q. If the Money be Aſſets in their Hands at Common Law. Lex Teſtament' 478, 479. 2 Brownl. 100. Goldſb. 2. Dyer 219, 177, 371. Co. Litt. 112. *b*. 113. *b*. Keil. 43. 107. Cro. El. 524. 1 Chan. Rep. 32, 35, 176, 248, 275. Vide poſt, 304. Pow. on Dev. 292, 297. Cow. 464.

IT was moved to have Writings brought in for the Defendant to have a Special Verdict at the Aſſizes drawn up, where the Caſe would be; That a Man

deviſed

deviſed his Lands to his Executors, to be ſold for Payment of his Debts: The Lands are ſold, and the Queſtion was, If the Money in their Hands would be Aſſets at Common Law to charge them in Debt? The Writings were ruled to be brought in, and Juſtice *Twyſden* ſaid, He had known it to be adjudged, That they are Aſſets at Common Law, without going into Chancery.

* *Bolton* againſt *Bolton.*

* P. 225

A Biſhop's Remiſſion from his Court may be ſhewn on Motion without pleading it. S. C. 2 Keb. 265.

A Prohibition was prayed for citing out of the Dioceſs of *Worceſter*, to *the Arches*, in a Caſe between a Huſband and Wife, for a Divorce by Reaſon of Cruelty; and Day given to ſhew Cauſe, on which they ſhew a Remiſſion from his Court by the Biſhop of *Worceſter*; whereupon it was objected, That this ought not to be upon Motion, but it ought to be pleaded; for the Statute of 23 *H.* 8. in the Exception of Caſes, ſays, Where the Biſhop of the Dioceſs does requeſt it, and the Canon and Civil Law admits of the Examination of ſuch Requeſt; and it is properly to be argued and ſhewn to the Court by the Civilians, whether their Law admits it in this Caſe: But the Court allowed the ſhewing of the Biſhop's Remiſſion upon Motion, and denied the Prohibition; and the ſame Caſe between the ſame Parties being afterwards moved in the Exchequer, the Prohibition was there denied by *Hale* and the whole Court, on ſhewing the Remiſſion, upon Motion, without putting the Party to plead it. *Levins* for the Plaintiff in the Prohibition.

Gee and his Wife againſt Sir *Francis Fane.*

A Recognizance of Bail joint and ſeveral, a *Scire Facias* joint, and ſo the Judgment, yet the Execution ſeveral. S. C. 1 Sid. 339.

GEE and his Wife brought an Action againſt *Burrel*; and Sir *Francis Fane*, and *Barker* became Bail for him, wherein they and each of them were bound in a Recognizance, That if he was condemned, to bring him in, or that *he* ſhould anſwer the Condemnation, or otherwiſe the Debt to be levied of their Lands and Chattels, as the Courſe is in the King's Bench; Judg-

Vide 2 Sid. 12. 2 Keb. 269, 274

ment was had againſt *Burrel*, and a *Capias ad ſatisfaciend'* ſued againſt him, and returned *Non eſt inventus*, but was not filed, and two *Scire Facias's* againſt *Fane* and *Barker*; and upon Default Judgment was, That the Plaintiff ſhould have Execution againſt them according to the Form of the Recognizance aforeſaid; and thereupon the Plaintiff takes a *Capias ad ſatisfaciend'* againſt *Fane* only, and levies the Debt upon him alone, by impriſoning him 'till he had paid it: And now it was moved for a *Superſedeas* and Reſtitution, becauſe the Writ erroneouſly iſſued. *Firſt*, For that the *Capias* againſt the Principal not being filed, no *Scire Facias* ought to have iſſued againſt the Bail. But it was ſaid by the Court, That the Writ being ſued and returned, it is * ſufficient, and it may be filed at any Time afterwards, and ordered it to be now done. *Secondly*, The Judgment in the *Scire Facias* being joint, the Execution by the *Capias* ought to have been ſo alſo, *viz.* againſt both the Bail, and not againſt *Fane* only. 1 *H.* 5, 4, 5, 13. *a.* 11 *H.* 4. 6. 3 *Cro.* 185. And although that the Recognizance was joint and ſeveral, ſo that they might have had a *Scire Facias* againſt one only, yet having elected to take it againſt both, the *Ca. Sa.* ought to be againſt both alſo; See 20 *H.* 7. 3. *b.* a *Sci. Fa.* on a Recognizance in this Court againſt two, one whereof is returned warned, no Proceedings may be againſt him till the other is warned, and has made Default: But by the Court. This is not a Judgment *to recover*, but to *have Execution*, and that is to be according to the Recognizance, either joint or ſeveral; but where the Judgment is joint, ſo ought to be the Execution: But the Recognizance upon which this *Scire Facias* iſſued, as upon a Judgment, being joint and ſeveral, although the *Scire Facias* was joint yet the Executione may be ſeveral, as the Record is upon which it iſſues; and therefore the Execution in this Caſe was ruled to ſtand good. And *Note*, Though the Recognizance be to levy it *de Terris & Catallis*, yet Execution by the Body is good by the Law and uſage of this Court. *Levinz* for the Defendant.

A *Sci. Fa.* againſt Bail before a *Capias* filed againſt the Principal, yet good if ſued and returned

* P 226

The Judgment being joint, Execution to be ſo alſo.

Heyman

Mich. 19 *Car.* II. *in B. R.*

Heyman againſt *Gerard.*

DEBT on Obligation, conditioned for giving an Account of all ſuch Moneys as ſhould come to his Hands, and to pay the ſame to the Plaintiff: The Defendant pleads, That no Moneys came to his Hands; the Plaintiff replies, That ſuch a Sum came to his Hands; whereupon the Defendant demurs. 1. For that it is not ſaid that he refuſed to account for it, and it is not the Receipt, but the refuſing to account which was the Breach of the Condition. 3 *Cro.* 320, 899. *Yelv.* 20. Whereto it was anſwered by *Jones*, That by the Plea it is admitted, that he did not give any Account, nor (indeed) could he give any, if no Goods came to his Hands; therefore it would be in vain to ſay, that he refuſed to give an Account of what he ſays he never received: But by the Court, The Replication * is ſufficient in not aſſigning a Breach, that he refuſed to accompt. And it is not like the Caſe of a Releaſe, *&c.* pleaded in Debt upon an Obligation to perform an Award, where it is ſufficient to anſwer to the Releaſe, being a foreign Matter, and out of the Condition, without aſſigning a Breach; but here the Plea is of a Matter within the Condition, and therefore it is not ſufficient to anſwer thereto, without aſſigning a Breach: For perhaps he had paid it, and therefore ought to have ſaid, That the Money came to his Hands, and that he had not accounted or paid it; And the whole Court ruled Judgment to be given againſt the Plaintiff. But he then prayed Leave to diſcontinue, which was granted, except the Parties would ſubmit the Truth of the Matter to their Counſel, to be determined by them.

Obligation to account and pay all Moneys that came to his Hands: Plea, No Money came to his Hands: Replication, That Moneys did come, *&c.* 'tis ill, not ſaying that he had not accounted, or paid. S. C. 1 Sid. 340. 1 Saund. 99, 102. 2 Keb. 258, 275. Vide 2 Show. 362. Q. 1 Saund. 117. 2 Show. 362, 363.

* P. 227

Diſcontinuance after Argument admitted. Vide 2 Danv. 156. Ante 48, 191. 2 Saund. 74.

Poſt. 298. 1 Mod. 13, 41. 2 Lev. 118, 124. 1 Sid. 84, 306. 1 Saund. 23.

Hamond againſt *Jones.*

A Freeman of *London* deviſes who ſhall be Survivor of the cuſtomary Part of his Children.

COVENANT was brought on a Covenant to pay to the Plaintiff's Wife ſo much as ſhould be due to her on the Death of her Brother *John*, by the Will of her Father and the Death of her ſaid Brother; and on the Evidence at the Trial at *Guildhall*, after the End of *Eaſter* Term, it appeared, That the Father was a Freeman of *London*, and deviſed, That his Third Part ſhould make the Cuſtomary Part of his Children 500*l.* a Piece, if their Cuſtomary Parts did not amount to ſo much, and that if any one of them died before twenty-one, his Part to be divided among all the others: All the Children died before twenty-one, except the Plaintiff's Wife, *John* the Brother being the laſt that died, and the Plaintiff had received out of the Father's Part, ſo much as would make his ſaid Wife's Part 500*l.* And the Queſtion was, if ſhe ſhould be entitled by the Father's Will to have the Cuſtomary Part of *John*? For it was objected by *Jones* and *Levinz*, That the Cuſtomary Part was not due by the Will, but by the Cuſtom, and to entitle her thereto, ſhe ought to take Letters of Adminiſtration to the Brother, but is not entitled thereto by the Father's Will, for he had no Power to appoint a Survivorſhip thereof: But by *Kelynge*, Chief Juſtice, Though the Father had not Power to diſpoſe of the Cuſtomary Part from his Children, yet he had Power to appoint a Survivorſhip thereof among the Children * themſelves by his Will. And ſo *Wylde*, Recorder of *London* and King's Serjeant, ſaid, it had been lately reſolved in Chancery, in a Caſe wherein he was of Counſel; and ſo *Kelynge* now directed the Jury, who accordingly gave a Verdict for the Plaintiff for the whole.

Vide 2 Chan. Caſes 117, 129. 2 Chan. Rep. 179. 2 Lev. 32, 130.

* P. 228 See 2 Chan. Caſes, 117, 129. 2 Chan. Rep. 179.

Quære of this Matter.

Term

Term. Sanct. Hill

ANNO

19 & 20 Car. II. in Banco Regis.

Freemantle againſt the Company of Silk-Throwſters.

THIS Caſe was referred by the Privy Council to be tried, whether a By-law made by the Company of Silk-Throwſters, That none of that Company ſhould have above ſuch a Number of Spindles in one Week, be a good By-Law or not? And after Verdict for the Plaintiff, on a Trial of the Fact, it was moved in Arreſt of Judgment, That it being a By-Law in reſtraint of Trade, and founded on their Charter of Incorporation, with Power to make By-Laws, and not on any Cuſtom, was a Monopoly, and void. To which it was anſwered and reſolved by the whole Court, That this is not a Monopoly, but a Reſtraint of a Monopoly, that none might engroſs the whole Trade; being rather to provide for an Equality of Trade, according to what is convenient, and good: And they gave Judgment for the Plaintiff.

A By-Law, That no Silk-Throwſter ſhall make more than ſo many Spindles a Week, good. S. C. r Keb. 309, 310.

* *Parker's* Caſe.

* P. 230

A Return on an *Habeas Corpus* was, That he was committed by Commiſſioners deputed for exerciſing the Office of Earl Marſhal (he being a Lunatick)

Court of Honour and Arms before the Earl Marſhall only.

Vide 1 Sid. 352. 353. Parliament Cases 58. 4 Mod. 128. Farefly. 185. 2 Salk. 553. 1 Keb. 310, 316. &c.

wick) before whom Sir *Edward Walker*, *Garter*, had complained, That *Parker* had painted Escutcheons, Trophies, and other Ensigns for the Funeral of the Lord *Gerrard*, and ordered and marshalled it without Licence of the Commissioners, Judges of the Court of Honour, and that for this Cause, they had committed him till further Order; Whereto Exceptions were taken, 1*st*. That no Court could be held before the Earl Marshal, or Commissioners to execute his Office, but the Court is to be held before the Constable and Marshal: But it was not allowed, or of Matters touching Arms and Honour, the Court is held before the Earl Marshal only, but touching Matters of ordinary Justice, which concern Life or Member, before the Constable and Marshal. 2*dy*. That the Commitment till further Order, was not good, that it ought to be till he be delivered by Course of Law; and to this Purpose were cited 1 *Cro. Selee*'s Case, and *Brice*'s Case *ibid.* and *Burkham*'s Case *ibid.* and 1 *Cro. Wolnough*'s Case, and *Freeman*'s Case *ibid.* the same, and 3 *Cro. Adie*'s Case. But on Consideration of all those Cases, the Court held the Return good in that Point; they agreed, That a Commitment till further Order by the Persons committing was not good, but till further Order generally, as here, is all one as by further Order of Law. (Q.) 3*ly*. It was excepted, That the Court of Honour cannot commit for painting of Arms, for it is a Trade, which any Man educated therein may lawfully use. But to that it was answered and resolved, That Painter-Stainers, as *Parker* here is, and not a Herald-Painter, though they may paint Arms for ordinary Uses, yet they cannot do it for great Solemnities or Funerals, without a Licence; much less marshal or order the Ceremonies of Funerals, as here, without a Licence; but therein they ought to be directed by the Heralds; as for all Noblemen by *Garter* King of Arms; for all Gentlemen on this Side *Trent* by *Clarenceux*, and beyond *Trent* by *Norroy*. Whereupon *Parker* * seeing the Opinion of the Court against him, submitted himself to Sir *Edward Walker*, *Garter*, and compounded with him for the Misfeasance, and thereupon being brought up again at another Day, he was discharged.

But of Life and Member before the Constable and Marshal.

A Commitment till further Order, good; but till further Order by the Party, ill.

Court of Honour orders the Funerals of great Persons. Vide 2 Lev. 133, 134. 2 Hawk. P. C. 16.

* P. 231

Hayward

Hayward againſt *Cunnington.*

TRESPASS for digging Turfs, the Defendant pleads that he is ſeized of an ancient Houſe, and preſcribes to have ſo many Turfs every Year as two Men could dig in a Day, as belonging to his Meſſuage: The Plaintiff demurs, for that it is not ſhewn that the Turfs were to be burnt in his Houſe, and all Eſtovers are to be uſed in the Houſe, and as it is laid here, they may be ſold although he claims them as appurtenant to his Houſe; and a Caſe was cited, That a Preſcription for digging Clay in another's Soil to make Pots, is void, which *Kelynge* Chief Juſtice remembered: But it was anſwered and reſolved, That when the Thing is uncertain as Eſtovers, it ought to be applied to the Houſe to aſcertain it, but here it is certain enough in itſelf, *viz.* ſo much as two Men could dig in a Day; and for Authorities were cited *Raſtal's Entries*, 539, and 1 *Cro. Spooner* againſt *Day*. And Judgment was given for the Plaintiff.

Preſcription for ſo many Turfs as two Men could dig in a Day, as appurtenant to his Houſe.
S. C. 1 Keb. 290, 311.
1 Sid. 354.
Vide 4 Co. 37.
5 Co. 17.
8 Co. 47, &c.
Plowd. 381.
2 Sid. 87.
3 Lev. 165.

Wheatly againſt *Lane.*

DEBT in the *Detinet*, and declares on a Judgment had by himſelf againſt the Defendant, as adminiſtrator of *Lane* for 27*l.* Damages in *Aſſumpſit*, and 8*l.* Coſts, and does not ſhew how, *i. e.* if the Damages or the Coſts were *de bonis propriis*, but generally *quod cum recuperaſſet* 27*l.* for Damages, and 8*l.* for Coſts; whereupon the Defendant demurred generally, and pretended that the Declaration was inſufficient; for if it was *De bonis ſuis propriis*, as it might be for the Damages on *ne unque* Adminiſtrator * or Executor, then it ought to be in the *Debet*, or if the Coſts are *De bonis propriis*, as they ought to be if he has not Aſſets; for them it ought to be in the *Debet*: But at the Day the Defendant

Debt on a Judgment againſt Executors in the *Detinet*, not ſhewing whether the Judgment was of his own Goods or the Teſtator's.

* P. 232

S. C. 1 Sid. 397.
1 Saund. 216.
2 Sid. 102.
2 Keb. 442, 431, 455.
Poſt, 255.
Hob. 206. Ante

Vide 6 Mod. 125. 1 Mod. 188. 2 Lev. 40, 189. Vide poſt, 255, 256. Ante 147. 6 Mod. 125. 2 Lev. 40. 189, 188.

Defendant did not appear to maintain his Demurrer, whereupon Judgment was given for the Plaintiff. See 2 *Cro.* 545, 546. that it is good in the *Detinet*, becauſe it ſhall be Aſſets when recovered, be it one way or the other. *Levinz* for the Plaintiff.

Bois againſt *Roſwell* and *Dickins* in Chancery.

A Deed of Truſt to pay the Profits to three in equal Manner, and *To convey the Inheritance* to them *in like ſort*; makes a Tenancy in Common of the Whole, ſo as in a Will. Vide Stat. 4 Annæ, c. 16. 1 Roll. Abr. 90. Mo. 594. 3 Cro. 39. Style 211. Owen 65, 25. Goldſb. 100, 141. Cro. El. 9, 163, 330, 421. 3 Leon. 11. 1 Leon. 166. 1 And. 194. Poph. 52. 2 Add. 17. Yelv. 183. 1 Bulſt. 142. 2 Lutw. 1173.

DICKINS ſeized in Fee, inſeoffed *Roſwell* in Truſt for himſelf for Life, and afterwards to pay the Profits to *John*, *Robert* and *Nicholas Dickins*, in ratable and equal manner; and alſo when they ſhould come to the Age of twenty-one Years, in like ſort to convey the Premiſes to them and their Heirs: *John* dies, leaving *Suſan*, his Siſter and Heir, in the Life of the Feoffor; *Suſan* marries *Bois*, and has Iſſue the Plaintiff *Bois*, and dies: *Nicholas* dies without Iſſue, leaving *Robert* his Brother and Heir; *Bois* exhibits his Bill to have an Account of the third Part of the Profits, and alſo to have the third Part of the Inheritance conveyed to him: *Robert Dickins* the Defendant claims the Whole: And the only Queſtion was, If this Truſt was a Jointenancy, and ſo ſhould ſurvive wholly to *Robert*, or a Tenancy in Common, ſo that the third Part ſhould go to the Heirs of *John*? And it was decreed by *Bridgman* Lord Keeper, aſſiſted by the Judges *Rainsford* and *Moreton*, That it was a Tenancy in Common; and that as well for the Inheritance as for the Profits, and as well in Caſe of a Deed of Truſt, as in a Will; in both which the Intent is to be conſidered, and the Inheritance here was to be conveyed in like ſort as the Profits, and that was in a ratable and equal manner, which in a Will would make a Tenancy in Common.

Str. 117. 3 Com. Dy. 34. 2 Vern. 720. Gil. on Dev. 37. 1 Peer. Wil. 19. Sal. 391. Swinb. 31. Ld. Raym. 622, 833. 2 Peer. Wil. 280. 3 Brown. P. C. 297. 4 Brown. P. C. 224. 1 Wil. 165, 341. Cow. 651. 1 Term. Rep. 596. 1 Brown Caſes in Ch. 249.

Hughes

* *Hughes* againſt *Hughes.* * P. 233

PROHIBITION on a Suit in the Eccleſiaſtical Court, for obliging an Adminiſtrator to a Diſtribution; and upon long and ſolemn Arguments, and hearing of Civilians at large, it was reſolved, That the Eccleſiaſtical Court could not oblige an Adminiſtrator to a Diſtribution, and that their Bonds taken to that Intent are void.

Eccleſiaſtical Court cannot bind an Adminiſtrator to a Diſtribution. S. C. Cart. 125. Raym. 499. Cro. Car. 101. Jo. 228. 1 Sid. 170. 3 Mod. 58. 1 Show. 25. Q. Stat. 22, 23 Car. 2. c. 10.

Sir *Walter Fane*'s Caſe.

HE being a Captain of the King's Guards, and being elected Reeve in the Lord's Court of the Manor of *Rowton*, to collect the Lord's Rents, *&c.* prayed a Writ of Privilege for his Diſcharge; which Juſtice *Twyſden* held, he ought to have in reſpect of the Dignity of his Office and his Attendance upon the King; and that he could not make a Deputy, no more than could a Conſtable; and cited *Hillary* 9 *Jac.* 1. *Rot.* 249. *B. R. Phips* and *Winchcombe*, to be reſolved, That a Conſtable could not make a Deputy, and 1 *Cro. Prowſe*'s Caſe, an Attorney ſhall be diſcharged from taking the Office of Conſtable, and much more a Captain of the King's Guards: But the other Juſtices to the contrary, a Conſtable may appoint another to execute his Place; and Juſtice *Wyndham* ſaid, That he himſelf did ſo when he was elected Conſtable of *Taunton*; where the Cuſtom is to elect Conſtables by the Houſes, which Cuſtom he and *Moreton* held good, contrary to the Opinion in *Prowſe*'s Caſe: And the Writ was denied; for this Office is only a new Office, and not Time out of Mind as an Attorney is, and obliged to attend the Courts of Juſtice.

Captain of the King's Guards not exempted from bearing the Office of Reeve. S. C. 1 Sid. 355. 2 Keb. 309. Vide 9 Co. 48, 49. 2 Inſt. 100. Noy 113. 1 Cro. 389. 3 Bulſt. 77.

1 Mod. 22. Poſt. 265, 266. A Conſtable may make a Deputy. Vide 1 Roll. Rep. 274, 275. Conſtables elected by the Houſe, *&c.* 2 Salk. 502.

Foote

* P. 234

* *Foote* againſt *Berkly.*

A Term miſrecited, and a new Deed at the End thereof, to commence preſently, though the whole latter Term incurs during the firſt, and ſo of no Effect, and the Rent payable preſently.
S. C. 1 Sid. 460.
1 Vent. 83, 88.
2 Keb. 654, 611. 514. 480, 673.
Vide Ante 77.
1 Vent. 83. 137.
1 Saund. 183, 184.

ERROR of a Judgment in the Common Pleas, where in an Ejectment and Special Verdict the Caſe was, The Prior of *Bedenham* ſeized in Fee, demiſed the Lands in Queſtion the 11th of *October*, 29 *H.* 1. to *Monday* for ninety-ſix Years, and that it came to *H.* 1. by Diſſolution, and from him to Queen *Elizabeth* by Diſcent, and that ſhe the 22d of *April*, 32 *Eliz.* demiſed it to *Monday* for thirty Years, from the End of the firſt Term; and that the Reverſion deſcended to King *Charles* I. who ſettled it in Jointure on his Queen *Mary*, and that ſhe the 12th of *May*, 14 *Car.* 1. reciting, that Queen *Elizabeth* by Letters Patents, Dated 22 *April.* 42 *Eliz.* had demiſed it to *Monday* for thirty Years, ſhe granted it to the Defendant for twenty-one Years from the End or Determination of the Eſtate granted to *Monday* by the ſaid Letters Patents; and that afterwards ſhe alſo granted it to the Plaintiff, who brought the Ejectment in the Common Pleas, and there had Judgment to recover, by Reaſon of a Miſtake in the recital of the Leaſe to *Monday*, 22 *April*, 32 *Eliz.* for that being ſo miſtaken, the Leaſe of 12 *May*, 14 *Car.* 1. commenced preſently upon the Sealing and Delivery, according to *Co. Litt.* 46. *b.* and *Miller* and *Johns* againſt *Manwaring* 1 *Cro.* and *Dyer* 116. And of the ſame Opinion were the whole Court here, after divers Arguments by *Jones*, *Maynard* and yonug Mr. *Kelynge* for the Plaintiff in Error, the Land being of great Value. And afterwards in *Trinity* 22 *Car.* 2. for till then it depended, the Judgment was affirmed by the whole Court, being reſtrained by the Words in the *Habend'* of the End of the Term granted to *Monday*, *by the Letters Patents aforeſaid*, although the Perſons, the Land, *&c.* are certain enough; and although the Term granted to the Defendant by this Means is altogether void, for that it expired before the Term to *Monday*, and ſo the whole would be otherwiſe fruitleſs and ineffectual, and yet he was obliged to pay his whole Rent of * 60*l. per Annum* for his whole Term of twenty-one Years, though he could never

* P. 235

never have the Poſſeſſion by Virtue thereof: *Monday*'s Term continuing till beyond the ſaid twenty-one Years; and yet by the reſtrictive Words *conceſſi per Literas Patentes præd'*, it is to commence from the Sealing and Delivery. But by *Kelynge* and *Twiſden*, If he had miſrecited *Monday*'s Leaſe, as he did, and then had granted the Land, *Habend'* for twenty-one Years, after *Monday*'s Intereſt determined, it had been good for twenty-one Years after *Monday*'s Leaſe ended, notwithſtanding the foregoing miſrecital.

Offly againſt *Warde.*

DEBT on a ſingle Bill made to *A.* to the Uſe of him and *B.* The Defendant pleads a Releaſe made to him by *B.* On which the Plaintiff demurs; and without Difficulty, it was adjudged for the Plaintiff, for *B.* is no Party to the Deed, and therefore can neither ſue nor releaſe it; but it is an equitable Truſt for him, and ſuable in the Chancery, if *A.* will not let him have Part of the Money; and the Book of *E.* 4. cited, that he might releaſe in ſuch a Caſe, denied to be Law.

Obligation to *A.* to the Uſe of *B.* *B.* cannot ſue or releaſe it.

Jone Noell againſt *Wells.*

DEBT by the Plaintiff, as Executrix to her Huſband: The Defendant pleads *never Executrix*; and on a Trial the Plaintiff produced the Probate of the Will in Evidence: The Defendant ſaid, That the Will was not a true, but a forged Will. And the Chief Juſtice, before whom it was tried, was of Opinion, That he could not give ſuch Evidence directly contrary to the Seal of the Ordinary in a Matter within his Juriſdiction, whereupon a Caſe was made for the Opinion of the Court, and a Verdict taken for the Plaintiff: But Judgment to be ſtaid, if the Court ſhould be of Opinion, That ſuch Evidence * might be given; and upon Motion the whole Court held, That it could not be given. But Evidence may be given, That

In what Caſes Evidence may be given againſt the Seal of the Ordinary. S. C. 1 Sid. 359. 2 Keb. 357. Raym. 405. 4 Inſt. 336. 1 Roll. Rep. 226. Hard. 131, 313. * P. 236 1 Show. 293. Q. 1 Mod. 101.

That the Seal was forged or repealed, or that there were *bona notabilia*; for thoſe confeſs and avoid the Seal. But he cannot give in Evidence that another was Executor; or that the Teſtator was *Non compos Mentis*, for thoſe falſify the Proceedings of the Ordinary in Caſes of which he is Judge. But thoſe are to be remedied by Appeal.

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* P. 237

* Termino Paſchæ.

ANNO

20 Car. II. in Banco Regis.

Edmunds againſt *Brown* and *Tillard.*

A Corporation ſeal a Bond, and particular Perſons ſign it, the Corporation is diſſolved, the particular Perſons not chargeable. 1 Stra. 434. Show. 174. 3 Wils. 269.

DEBT on an Obligation of 500*l.* The Defendant pleads *Non eſt factum*, and on the Evidence it appears, That the Defendants were two of the Principal of the Company of Woodmongers lately diſſolved; and that the Money was borrowed in the Name of the Company, and the Obligation ſealed in the Company's Name, and with their Seal; and the Defendants, as was uſual, ſet their Names to the Obligation, but the Obligation was, *Noverint univerſi per præſentes nos Magiſtrum & Guardianos, &c. del Company de Woodmongers teneri, &c.* And the Obligation was endorſed with *ſigillat' & deliberat' in præſentia, &c.* and atteſted. And now the Company being diſſolved, the Plaintiff brought the Action againſt the Defendants, intending to charge them in their own Right. But it was ruled by the Chief Juſtice at *Niſi prius* at *Guild-hall*, that he could not ſo do, it being *ut ſupra*; whereupon the Plaintiff was nonſuit.

Jenkins

Jenkins againſt *Keymes* in Chancery.

SIR *Nicholas Keymes* being Tenant for Life, the Remainder to his Son Sir *Charles* in Tail; they about the Year 1641. in Conſideration of a Marriage to be had between Sir *Charles* and *Blanch Manſel*, and 2500*l.* Portion paid, levied a Fine to the Uſe of Sir *Nicholas* for Life, the Remainder to Sir *Charles* * and *Blanch* for their Lives, the Remainder to the Heirs of the Body of Sir *Nicholas* (Sir *Charles*) of the ſaid *Blanch* begotton, the Remainder to the Heirs of the Body of Sir *Charles*, with Power for Sir *Nicholas* to charge the Premiſſes with 2000*l.* Sir *Nicholas* and Sir *Charles* about the Year 1642. joined in a Leaſe and Releaſe to *David Jenkins*, the *Welſh* Judge, and his Heirs, for 200*l.* on Condition of Payment of 2000*l.* with Intereſt ſome Years after, to be void, and Covenants, on default of Payment, to make further aſſurance. And about the Year 1643. by Indenture, between Sir *Nicholas* of one Part, and Sir *John Awbry* of the other Part, Sir *Nicholas* reciting the Power, it is ſaid, in the Indenture, that he charged the Premiſſes with 2000*l.* for the payment of his Debts; but it is not ſaid, That he granted any thing to Sir *John Awbry*, nor that he charged the Lands to Sir *John Awbry*, or to any other Perſon, but (only) that he charged them. *Blanch* afterwards dies without Iſſue, Sir *Charles* marries another Wife, by whom he had Iſſue Sir *Charles* the Defendant, and dies: *David Jenkins* dies, and leaves *David Jenkins* the plaintiff his heir and Executor, who brought an Ejectment in the Exchequer-Chamber; and on a Special Verdict it was adjudged, as before appears, That the Leaſe and Releaſe was no good Execution of the Power at Common Law; and now he brought his Bill in Equity on theſe Grounds, *viz.* 1*ſt.* That the Conſideration of the Marriage of *Blanch*, and the 2500*l.* paid with her did not extend to the Defendant, being an Iſſue by the ſecond Venter, and ſo the Eſtate in Remainder, whereby he claimed, was voluntary. 2*dly.* That the Father, Tenant in Tail, joining in the Conveyance (who might by Fine have barred the Defendant) if his Iſſue could not be obliged by his Covenant for further

A Conſideration paid on one Marriage, extends to the Iſſue on another Marriage.

* P. 238

1 Lev. 150, 237, 64. Ch. Caſ. 103. 2 Wms. 599. ante 256. Vide ante 150, 151. Hard. 395.

Tenant in Tail mortgages without a Fine, and Covenants for further Aſſurance, the Iſſue is not bound in E-

Where a Power ill executed in Law is not good ill Equity, or *e contra.*

further Aſſurance, to make that Aſſurance good which his Father had made. 3*dly*. If not, then though the Power be not well executed as to the Intent, yet whether it ſhall not be made good in Equity as to the 2000*l*. And upon the Bill and Anſwer with this further, That Sir *John Awbry* having 500*l*. due to him, and ſuing here for Relief, his Bill was diſmiſſed, Sir *Nicholas* only having ſealed the Deed, and no Proof that Sir *Charles* aſſented thereto, which was now made appear; (Q.) and it alſo appeared that the Defendant had paid other Debts of Sir *Nicholas* due by Bond to the Value of 2000*l*. And now on the ſaid Points it was declared by the Lord Keeper *Bridgman* as to the firſt, the Conſideration of 2500*l*. * paid on the firſt Marriage, ſhould extend to the Iſſue by the ſecond Venter; and as to the *ſecond*, That the Iſſue in Tail was not bound by the Covenant of his Father to make that Aſſurance good, which his Father might have made good by a Fine, although it was ſaid, That it had been ſo done formerly, and that the Lord Chancellor *Hyde* was of that Opinion: And as to the *third*, The Lord Keeper held, That Sir *Nicholas* and Sir *Charles* joining in the Conveyance to *Jenkins*, and covenanting on default of Payment to make further Aſſurance, cannot be taken to be an Execution of the Power at all, but as a common Mortgage; and although that the Deed to *Awbry* was not a legal Execution of the Power, for default of a Perſon to whom it ſhould be charged, yet it being intended for an Execution of the Power, it ſhall be aided in Equity before that to *Jenkins*, and that the Defendants having, (tho' not Executors) paid to the Value of 2000*l*. in Debts, may apply it in Execution of the Power to the Diſcharge of the Lands, being Tertenants.

* P. 239

Term. Sanct. Trin.

ANNO

20 Car. II. in Banco Regis.

Lake againſt *King*.

CASE for printing a Libel of him, and publiſhing and diſperſing thereof to ſeveral Perſons, charging him with Extortion in his Office of Vicar General to the Biſhop of *Lincoln*; and the Defendant pleads, That the Plaintiff extorſively took of *A. B.* and *C.* and of other Perſons, ſeveral Sums of Money; whereupon he printed and preferred the Petition to the Committee of Parliament for Examination of Grievances, and diſtributed printed Copies thereof to ſeveral Members of the Committee, as he lawfully might, which is the ſame printing, *&c.* On which the Plaintiff demurred, and took divers Exceptions, *viz. Firſt*, That he does not name all the Perſons of whom he took the Money, but only of *A. B.* and *C.* and divers others: To which it was anſwered and reſolved by *Kelynge* and *Twſden* only in Court, That the taking of the Money is not made uſe of but only for inducing the Juſtification of printing and publiſhing the Petition, and ſo it need not mention all the Perſons of whom he took the Money. *Secondly*, That the Delivery of ſuch a Number of Copies is an unneceſſary Publication of a Scandal, and not juſtifiable: To which it was anſwered and reſolved, That the Delivery to ſeveral Members of the Committee who have the Examination of ſuch Matters is juſtifiable, and is the common Uſage in

Printing and delivering Copies of a Petition to the Parliament, is no Libel, though it tends to ſcandal, S. C. 1 Sid. 414. 1 Saund. 131. 2 Keb. 361, 462, 496, 649, 664, 801, 832. 1 Mod. 58. Hard. 470. 1 Danv. 196. Vide Yelv. 117. Godb. 405. Hard. 223, 470. 4 Co. 14. b. Lane 50 2 And. 28. 2 Brownl. 100. 1 Bulſt. 151, 185. 2 Bulſt. 269. Noy 102. Mo. 143, 705, 706, 820. Palm. 145,

188, 189. 3 Leon. 123. 3 Leon. 35. 1 Sid. 414. 2 Sid. 163. 1 Vent. 25. 2 Salk. 417, 412, 419. Bull. N. P. 6. 2 Burr. 807. 1 Term. Rep. 110. 1 Hawk. P. C. 354.

ſuch

* P. 241

such Cases for Information of the Members of the Committee. *Thirdly*, It was objected, That the *Quæ est eadem* (*which is the same*, &c.) was not good without a Traverse That he *delivered it to any others; to which it was answered and resolved, That the Charge being general, *To divers Persons*, and he justifying the Delivery to the Members of the Committee, who are several Persons, it is sufficient; but if the Action had been for delivering of them to divers Persons by Name, and he justified the Delivery to any (of them) by Name, he ought to have traversed the rest. *Fourthly*, It was objected, That he could not justify the Printing, for by that means the Matter is published to Printers and Composers, which ought not to be, for the reading of a scandalous Letter to another is a Publication thereof; and so is the writing of a Copy thereof. 9 *Co.* 59. *b. Lamb*'s Case; whereto it was answered and at length resolved, That the printing thereof with Intent to deliver the Copies to Members of the Committee is justifiable, but if he had delivered them to others, it would be otherwise; and the printing of them is not so great a Publication as it would be to have so many of the Copies transcribed by several Clerks. A fifth Objection was, That the Publication is laid to be the first of *November*, and the Justification is the second of *November* which is not good without traversing the first of *November*; and the whole Matter being transitory, and the Day not material, he ought to have justified on the same Day, or to have traversed the first of *November*: To which it was answered, and at last resolved, That the Plea (the Day not being material) is good: And afterwards in *Trinity* 22 *Car.* 2. the Matter was again argued at the Bar, and then *Kelynge* and *Moreton* inclined, That the Printing was not justifiable, and that the Committee ought not to be informed by Printing or Copies, but (only) *viva voce*: But afterwards in *Michaelmas* Term following Judgment was given for the Defendant.

A Fact laid 1 *Novembris*, justified the 2nd of *November*, with a *Quæ est eadem*, good without a Traverse. Cro. El. 667, 705. Post, 245. 1 Wil. 219. 1 Sal. 390. 5 Com. Dig. 110, 117. 1 Term Rep. 479.

King

King againſt *Standiſh.*

ACTION on the Statute 27 *E.* 3. of *Præmunire*, and declares, That in *Eaſter* Term 18 *Car.* 2. he recovered 200*l.* Debt in this Court againſt the Defendant, and that afterwards the Defendant exhibited his Bill in Chancery, and obtained a Decree for vacating of the Judgment: The Defendant demurs; and now it was argued by *Bigland* for the Defendant, That a Suit in Chancery after a Judgment is not within the Statute. 1*ſt*, The * Chancery by *Engliſh* Bill was not then *in eſſe*. *Lambard's Juriſdiction of Courts*. Anciently the King heard Cauſes of Equity on Petition to himſelf, and ſometimes by Reference to the Chancellor; and the firſt Statute which gave Countenance to this Court, was the Statute of 36 *E.* 3. 9. and ſuch Caſes of Equity were rarely in Uſe till the Time of *E.* 4. when they increaſed by occaſion of Uſes. *Secondly*, That the Chancery is the King's Court, and therefore the King is not (by the Statute) diſinherited from Suits there; but from Foreign Suits to Foreign Courts he was. *Thirdly*, The Statute appoints, That the Offender ſhall appear before the King and his Council, or in the Chancery, and it is impertinent to put the Party to appear in Chancery for ſuing in the Chancery; and the Reaſon of making this and the other Statutes againſt Proviſors, was to prevent the Pope from drawing the People to *Rome*; and where the Statute ſays, *To* Rome *or other Courts*, that ought to be intended of Courts of like Nature as *Rome*, as the *Legantine* Court of the Pope here. 29 *E.* 3. 20. the Archbiſhop of *York's* Caſe. 5 *E.* 4. 6. *alibi* intended the Biſhop's Court. See *Twyſden's Antiquities of the Church*, That the Reaſon of this Statute was to diſable the then Pope, being a *French* Man, and the King having then War with *France*; and from this Time the *Peter-pence* were denied: And as to the oppoſite Authorities, 2 *Cro.* 344, 345. *Moor* 838. 5 *E.* 4. 22 *E.* 4. 37. *Co. Litt. Præmunire*, *Throgmorton*, and *Finche's* Caſes, conſtant Practice has been to the contrary ever ſince, throughout the whole Reigns of *Jac.* 1. *Car.* 1. and *Car.* 2. and in 14 *Jac.* 1. this Matter was referred by the King to all

The Chancery by vacating a Judgment given at Common Law, Q. If within the Statute of *Præmunire* of 27 *E.* 3.
S. C. 1 Sid. 268, 463, &c. 1 Mod. 59. Raym. 227. Hard. 120. 2 Keb. 662, 402. Vide 3 Keb. 21, 354. 3 Term Rep. 315. 1 Hawk. P. C. 80.

* P. 242

1 Chan. Rep. 50, 51. verſ. Finem.

the Judges and his Council, and by them agreed, That the Chancery was not within the Statute; and this is inrolled in the Chancery. *Saunders* on the other Side cited for Authorities to the contrary, the Parliament Roll. 13 *R.* 2. No. 30. 4 *Inſt.* 82. Stat. 4 *H.* 4. *c.* 23. That Judgments in the King's Court ſhall not be avoided, except by Error or Attaint. Stat. 31 *H.* 6. *c.* 2. in *Raſtal*'s Statutes at large, but not in *Poulton.* 22 *E.* 3. 37. *Finch* and *Throgmorton*'s Caſe, 4 *Inſt.* 2 *Cro. ſupra*, 4 *Inſt.* 20. the Articles againſt Cardinal *Wolſey*, 2 *Inſt. Articuli Cleri*, *c.* 2. That the Eccleſiaſtical Courts are the King's Courts, and yet are within the Statute; and although the Chancery was not (then) in the ſame Uſe as now, yet now it is of equal Miſchief, and is another (kind of) Court than that where the Judgment is given, 1 *Roll.* 381. and *Dr.* and *Stud. Lib.* 1. *c.* 8. The Court

* P. 243

* ſaid little but inclined to adjourn it into the ſaid Exchequer-Chamber; however it depended here till *Trinity* Term, 22 *Car.* 2. when it was moved again, and *Hale* being then Chief Juſtice held, That this Caſe was not within the Statute, and ſo he ſaid it would appear by the Petition whereon the Statute was founded. And ſo nothing further was done thereupon.

Turner and *Cary* againſt *Neele.*

The Original Cauſe being within the Admiral's Juriſdiction, the Conſequent thereof ſhall be tried there alſo. 8 C. 1 Sid. 367. 2 Keb. 360. Raym. 473. 1 Salk. 35. 6 Mod. 11, 79. 2 Show. 338. 1 Vent. Vid. infra 267. Trin. 21. Jurado v. Gregory.

PROHIBITION, a Man who had *Letters of Mark* in the late War with the *Dutch*, took an *Offender* inſtead of a *Dutch* Ship, and brought it into Harbour, and libelled againſt her to have it condemned as a Prize, and there is a Sentence, That it was no Prize; and now the *Offender* libels in the Admiralty againſt the Captor for Damages, ſuſtained by a Hurt that the Ship received in the Port; and a Prohibition was prayed, For that this Suit was for a Damage done in the Port, for which an Action lies at Common Law. But the Prohibition was denied (after it had been twice moved and debated) becauſe the Original being a Caption at Sea, and the bringing into Port, in order to have it condemned as Prize, but a Conſequent thereof, not only the Original, but alſo the Conſequents ſhall be tried there. See 3 *Cro.* 685. *Roll. Abr.* 530.

The

The King againſt *Jo. Seellers.*

ERROR of a Judgment upon an Indictment before the Juſtices at the Quarter-Seſſions for uſing the Trade of an Upholſterer, and aſſigned, That it was not a Trade within the Statute, and cited 2 *Bulſt.* 186. the Opinion of three Judges, and *Calthrop's Courts and Cuſtoms of* London, 48, 59. But the Court, *viz. Kelynge*, *Twyſden* and *Wyndham*, held it a Trade within the Statute, and affirmed the Judgment; and they ſaid, That ſo had a Barber and a Tailor been reſolved Traders within the Statute.

Upholſterer, Barber and Tailor are Trades are within Statute 5 *Eliz.* S. C. 1 Sid. 367. 2 Keb. 366. Vide 1 Sid. 269. Ante 87. 1 Saund. 311, 312. 2 Lev. 206. 1 Salk. 203, 304. 2 Show. 210. Poſt.

* *Danvers* againſt *Thiſtlethwaite.*

* P. 244

ASSUMPSIT in a feigned Action directed out of Chancery, Whether an Obligation of 200*l.* for Payment of 100*l.* won at Play, was void or not; and on a Special Verdict found before *Kelynge* Chief Juſtice, the Caſe was this; *Danvers* and *Thiſtlethwayte* played at Dice, and *Thiſtlethwayte* won of *Danvers* a Watch of 10*l.* Value, which was preſently delivered; and alſo 100*l.* for which the Obligation in Queſtion was given: And whether the Obligation was void by the Statute of 16 *Car.* 2. *c.* 7. which ſays, *That if any Perſon ſhall play and loſe any Sum of Money, or other Thing exceeding* 100*l.* *at one Meeting, upon Ticket or Credit, or otherwiſe, and ſhall not then pay it; the Party loſing the Money or other Thing beyond the Sum of* 100*l.* *ſhall not be compelled to make good the ſame; and that all Obligations*, &c. *made for ſecuring it ſhall be void*, was the Queſtion: And it was argued by *Kelynge junior*, That the Obligation was good, for the Statute does not reſtrain the playing for ready Money, be the Sum ever ſo great, but ſuch Gaming only as brings Men into Debt, and here is no more than 100*l.* loſt in Debt or on Tickets, and the Watch was as ready Money; and if a Man loſe 500*l.* in ready Money, and 100*l.* more upon Tick, an Obligation given for ſecuring the 100*l.* is not void by the

A Watch and 100*l.* upon Ticket won at play at the ſame Time, and a Bond given for the 100*l.* It is void, Q. S. C. 1 Sid. 394. Vide 2 Keb. 451. 2 Mod. 54.

Statute; and ſo held *Kelynge* Chief Juſtice, before that the Verdict was found: But *Jones* argued to the contrary, That if above 100*l.* be loſt at play, and Part paid preſently, and a Bond given for the Reſidue, the Bond is void; and it is the ſame, where goods are ſo loſt and delivered immediately, and 100*l.* more upon Tick, for which Bond is given, the Bond is void: And to that *Twyſden* and *Wyndham* inclined, and that this Statute being made for ſuppreſſing of Gaming and Vice, ſhould be taken as largely as might be; but it was adjourned: But afterwards in *Hillary* 20 & 21. it was moved again, and then Judgment was given for the Plaintiff by *Kelynge* and *Twyſden*, being then of his Opinion, *Wyndham* being dead, and *Moreton* holding to the contrary.

* P. 245

* *Fitz-Williams* againſt *More.*

Executor charged in *Devaſtavit* ſhall find Bail, Executor found Bail in an Inferior Court, and if the cauſe be removed, in the ſuperior court alſo. S. S. 1 Sid. 368. 1 Keb. 295, 371. Poſt, 268, contr. Vide Litt. Rep. 5, 81. 1 Sid. 68, 368, 418. Vide ante 147.

A *Scire Facias* againſt the Defendant an Adminiſtrator on a *Devaſtavit* alledged, and Judgment of his proper Goods, on which he brought Error: and by the whole Court he ſhall find Bail, for he being here charged in his proper Goods, it is not as in the Caſe where an Adminiſtrator is charged in the Teſtator's Goods; but here it is as in his own Right, and not like to *Mildmay*'s Caſe in 2 *Cro.* nor to *Goldſmith* and *Platt*'s Caſe in 2 *Cro.* And by *Twyſden*, an Executor charged in an Action as Adminiſtrator on a *Devaſtavit*, ſhall find Bail, and ſo he ſaid it had been adjudged; and if an Executor finds Bail in an inferior Court, and is removed by *Habeas Corpus*, he ſhall find Bail in the ſuperior Court: But *Note*, the contrary was afterwards done in the Caſe of *Caſtle* and *Willy*, hereafter, *Trin.* 23 *Car.* 2. Poſt, 255, 260, 268.

Skiner

Skinner againſt *Andrews.*

DEBT on Obligation conditioned to perform an Award ſo that it be made before the 25th of *March*; the Defendant pleads no Award. The Plaintiff replies, That before the exhibiting of the Bill, *viz.* the 24th of *March*, the Arbitrators made the Award, and aſſigns a Breach: On which the Defendant demurs, for he ought to have pleaded, that before the 25th of *March*, *viz.* the 24th of *March*, he made the Award; for the Award might be made after the 25th of *March*, and yet before the exhibiting of the Bill and the Day is not traverſable, for the Award made any time after the Submiſſion before the 25th of *March*, was good, and nothing is here traverſable but the 24th of *March*, and it alſo comes after the *viz.* which is never traverſable; but if he had ſaid, That before the 25th of *March* they had made the Award, that had been traverſable: And of that Opinion was *Kelynge*, Chief Juſtice, and that the Replication was therefore ill. The reſt on the contrary held, That after the Defendant has pleaded no Award, he cannot have any Plea which admits the Award made, but that it was void in law, nor any other thing, but that *they made no ſuch Award*; and if on the Evidence it does not * appear to be made before the 25th of *March*, the verdict ſhall be againſt the Plaintiff. And they gave Judgment for the Plaintiff.

Debt on Obligation, Defendant pleads no Award; plaintiff replies, That before exhibiting of the Bill, *viz.* ſuch a Day, they made an award good. On Iſſue no ſuch Award, proof may be that it is void. S. C. 1 Sid. 370. 2 Keb. 361, 388. 1 Saund. 169. Ante 241. 1 Saund. 118, 169, 170, 286, 287.

Allen againſt *Cutler.*

* P. 246

A *SCIRE Facias* on a Recognizance in Bail on a Writ of Error, conditioned, if Judgment be affirmed to pay the Money, &c. The Defendant pleads payment, but does not ſet forth any place where; on which the Plaintiff demurred, and ruled for Judgment for him for default of the *Venue*. But then it was moved, That the Writ being not returnable at a Re-

Writs in *B. R.* are returnable on return-days, bills on a day certain. A *Scire Facias* on bail, not ſhewing the condition, is as a Writ, bu ſhewing the condition, is as a Bill. S. C. 1 Keb. 396, 397.

turn

turn-Day, but a Day certain, and not being grounded on any Bill, or thing in nature of a Bill, it ought to have been returnable at a Return Day. But if the *Scire Facias* had ſet forth the Condition of the Recognizance, then it had been in nature of a Bill, and might be made returnable at a Day certain; but here it is made uſe of wholly as a Writ, and therefore it ought to be made returnable at a Return-Day; and ſo, as all the Clerks ſaid, was the conſtant uſage, whereto the whole Court agreed, and ſtayed the judgment.

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* P. 247

* Term. Sanct. Trin.

ANNO

20 Car. II. in Banco Regis.

Cooper againſt *Witham.*

Caſe againſt the Husband, for that the Wife affirming her ſelf to be ſole, procured the Plaintiff to marry her. S. C. 1 Sid. 375. 2 Keb. 399. Vide ante 53. Bull. N. P. 82.

CASE againſt the Huſband and Wife, for that ſhe being covert, affirmed her ſelf to be ſole, and requeſted the Plaintiff to marry her, and lays it to be done maliciouſly, with Intent to deceive him; whereupon he married her, whereby he was diſturbed in Conſcience, and put to great Charge by the Huſband. After a Verdict for the Plaintiff on (the Iſſue) Not guilty, it was moved in Arreſt of Judgment, That the Action

Action does not lie; for the Wife cannot by any Contract or Agreement charge the Husband, and if he ſhould be charged here, it would be by the Wife's Contract with the Plaintiff to marry him; but for Treſpaſs or Words ſhe might charge the Husband, for that ſhe may do without Aſſent of the Husband or any other; and if Damage enſue thereupon, it ought to be recompenſed by ſome Body, and no other can do that but the Husband. But this Marriage could not be made without the Aſſent and Contract of the Plaintiff (himſelf) and therefore it ſhall not charge the Husband, and ſo held the Court, and gave Judgment for the Defendant: They alſo ſaid, That this was Felony in the Wife, and *Twyſden* ſaid, That an Action did not lie for the Maſter for beating of his Servant to Death, for that he loſt his Service; for the Party ought to be indicted for it, as is *Yelv.* 90. But ſee *Latch* 144. *Markham* againſt *Cobb*, *Style* 346, 347. *Dawes* againſt *Coveneigh*, That Treſpaſs lies for a felonious taking Money after * the Party has been convicted and burnt in the Hand: Alſo it was here ſaid, That the Wife had been pardoned of the Felony, but that did not appear upon the Record; and if ſhe had, yet the Fact founding in Contract, it ſeems that the Action does not lie. *Weſton* for the Defendant.

* P. 248

Payne againſt *Beuwmorris.*

CASE, for that the Plaintiff being a Miniſter free from Unchaſtity, and agreed to be retained Chaplain to the Duke of *Ormond*, the Defendant did falſly and maliciouſly ſay of him, *He has a Baſtard on the other ſide the River, and it is ſo indubitable that I fear not to divulge it, and if I am troubled for it, I can juſtify it*, whereby he loſt the Chaplainſhip to the Duke of *Ormond*: After Verdict it was moved, That the Chaplainſhip is Spiritual: But the Court to the contrary, His Preferment is Temporal, like as a Parſonage; and gave Judgment for the Plaintiff.

He has a Baſtard, ſpoken of a Miniſter whereby he loſt a Chaplainſhip. S. C. 1 Sid. 376. 2 Keb. 400. Nelſon's Lutw. 334.

Clipſam

Clipſam againſt *Morris.*

A. indebted to the Plaintiff, writes a Note to the Defendant to pay it, who in Conſideration the Plaintiff would forbear a Fortnight, promiſed to pay him.
S. C. 1 Sid. 396.
1 Saund. 210.
1 Vent. 9. 154.
1 Mod. 12.
Vide 2 Keb. 453, &c. *ibid.*
1 Danv. 58.
Vide poſt 262.
1 Saund. 210.
1 Vent. 9.
Style 249.
1 Saund. 210.
1 Sid 396.

ASSUMPSIT, That whereas *A.* was indebted to the Plaintiff, and wrote a Note to the Defendant to pay it to the Plaintiff; the Defendant on Receipt of the Note, promiſed to the Plaintiff, That if he would accept of his Promiſe for a Fortnight, that he would pay it, and avers, That he tarried a Fortnight; after Verdict for the Plaintiff it was moved in Arreſt of Judgment, That it was no Conſideration, for the Defendant is not the Debtor, nor was the ſaid *A* obliged to ſtay a Fortnight, whereto *Twyſden* on the firſt Motion inclined: But *Kelynge* and *Moreton* on the contrary held, That it did amount to an Agreement generally to forbear, not only for the Plaintiff, but alſo for *A.* for a Fortnight: But afterwards in *Hillary* following it being moved again, and a Caſe between *Newcomb* and *Lee* in *Eaſter* Term 1650. *Rot.* 62. in *B. R.* being cited to be the very Caſe in Point, the whole Court held it to be no Conſideration, and gave Judgment for the Defendant.

1 Mod. 12. Hard. 71. Winch. 7. Bur. Rep. 2630. Doug. 269. Cowp. 548.

* P. 249

* *Barns* againſt *Hughs.*

Debt lies at *Weſtminſter* on a penal Statute, but an Indictment or Information in the proper County only.
S. C. 1 Vent. 8, 364.

DEBT on the Statute of 5 *Eliz.* brought in the King's Bench, for uſing the Trade of a Grocer at *Salisbury*, and ſent and tried by *Niſi Prius* at *Salisbury*: And after Verdict for the Plaintiff on *Nil debet*, it was moved in Arreſt of Judgment, That the Action did not lie in this Court, but ought to have been brought and tried wholly in the proper County, by the Statute 23 *Car.* 1. And for this were cited *Hillary*

2 Keb. 401, 424, 447, 458. Vide 1 Sid. 400. Curtis verſ. Inman. 3 Lev. 71. Litt. Rep. 163.

23 *Car.* 1. *B. R. Rot.* 611. *Mich.* 13. *Car.* 1. *B. R. Brethurgle* againſt *Haſcall, & Mich.* 1654. *Child* againſt *Bull*, and *Trin.* 1652. *Rot.* 1377. *Bunton* againſt *Shalate.* But on the other Side it was ſaid, That the Action of Debt did not lie at the Seſſions or Aſſizes in the Country; and the Stat. 5 *Eliz.* gives the Recovery by Action of Debt, as well by Indictment or Information; and the Statute 21 *Jac.* 1. does not concern the Statute of 5 *Eliz.* in any Part; and therefore the Statute of 21 *Jac.* 1. is to be taken by referring Particulars to Particulars, *viz*, *by Indictment* or *Information* (which will lie there) *in the proper County, but for Actions of Debt* (which will not lie in the proper County) *in the ſuperior Courts*, where it will lie; and for this were cited 1 *Cro. Farrington* againſt *Keymer*, and *ibid. Green* againſt *Gray*, *Latch* 192. 1 *Roll. Abr.* 537. *Trin.* 1653. *B. R. Hodges's* Caſe. And if it ſhould not be ſo, there might be a Failure of Juſtice; as if the Party offends againſt the Statute in one County, and goes and lives in another County, and the Information or Indictment is laid in the proper County, for there the Party cannot be brought in to plead: But for Debt in the ſuperior Court he may be brought in hither out of any County, and the Iſſue is to be tried by *Niſi prius* in the proper County. And of that Opinion were all the Judges, *viz. Kelynge Twyſden* and *Moreton*, *Wyndham* being dead; and after the Caſe had been twice argued at the Bar, theygave Judgment for the Plaintiff in *Hillary* Term next following; and they ſaid, That the Statute of 21 *Jac.* 1. was not made to ouſt Actions of Debt on penal Statutes, but to give ſuch Remedies for them in the proper County as may be had there: But afterwards in *Mich.* 29 *Car.* 2. the * contrary Opinion was held in the King's Bench, between *Clapp* and *Edgecombe*, which you may ſee hereafter.

Cro. Eliz. 112, 146. 4 Bac. Abr. 391. Hob. 108. Style 343.

* P. 250

2 Lev. 204.

Gaudy againſt *Smith.*

CASE for theſe Words, *You are a ſacrilegious Perſon, and commit Sacrilege every Day*: After Verdict upon Not guilty, it was moved in Arreſt of Judgment,

You commit Sacrilege every Day, not Actionable.

S. C. 1 Sid. 376. 2 Keb. 400, 430.

That

That the Words are not actionable, for Sacrilege may be either by a felonious ſtealing of Goods of the Church, which is Felony, or by detaining of Tithes, Obligations, or other Eccleſiaſtical Duties, which is not Felony; and it being ſaid to be done every Day, it muſt be intended to be ſpoken in the laſt Senſe, for it ſhall not be intended that a Man commits Felony every Day, and ſo, after two Motions, held the Court, and gave Judgment for the Defendant, although the Words were laid to be ſpoken maliciouſly, and to cauſe him to be brought in Queſtion for his Life.

Smedly againſt *Heath.*

Cheating Knave, of a Mercer, not ſpeaking of his Trade, not actionable.

CASE for ſaying of him, being a Mercer, *He is a cheating Knave and Rogue.* After Verdict for the Plaintiff Judgment was ſtayed, for that the *Colloquium* was laid to be of him; but not of his Trade.

S. C. Raym. 169. 2 Keb. 404. Vide 1 Sid. 433.

Frevin and his Wife againſt *Paynton.*

Adminiſtrator ſhall ſue the Leſſee in Poſſeſſion in the *Detinet* only, for the Rent. S. C. 1 Sid. 224, 379. 2 Keb. 407.

DEBT as Adminiſtrator againſt the Defendant Leſſee for Years, for Rent, and counts of a Leaſe made to the Inteſtate, and that he being poſſeſſed, demiſed to the Defendant rendering Rent, and brought the Action in the *Debet & Detinet*; The Defendant pleads; That the Inteſtate before the Leaſe to him had aſſigned his Term; and traverſes, that the Inteſtate was poſſeſſed when he demiſed to the Defendant; Iſſue thereupon, and Verdict for the Plaintiff: And it was moved in Arreſt of Judgment, That the Declaration by the Adminiſtrator in the *Debet & Detinet* does not lie; for although in Debt againſt the Adminiſtrator he ſhall be charged in the *Debet & Detinet*; as *Hargrave*'s Caſe,

But an Adminiſtrator ſhall be ſued in the *Debet & Detinet*

Vide ante 224. 2 Lev. 73, 80. 1 Sid. 224, 266, 342, 375. Poſt, 255. 2 Lev. 74, 80. 3 Lev. 74. 2 Jones 169. Palm. 117. Aleyne 34. Yelv. 9. Noy 32. Owen 125. 1 Bulſt. 22. Cro. Eliz. 840. 2 Cro. 545, 412. 5 Com. Dig. 201. 2 Bac. Abr. 246, 382, 442. Doug. 4. 1 Term Rep. 126.

5 *Co.* 31 * is, in reſpect of his Poſſeſſion; yet in Debt by the Adminiſtrator, of one who had a Term, and made a Leaſe, and the Reverſion comes to the Adminiſtrator he ſhall ſue Debt for the Rent in the *Detinet* only, becauſe all that he recovers ſhall be Aſſets. But where an Executor is ſued, he in reſpect of the Poſſeſſion and Profits of the Land taken by himſelf ſhall be charged of his own Goods, and ſo held the Court, That the Declaration was not good; but it is cured after Verdict, by the Statute of *Jeofails* made at *Oxford*. *Levinz* Counſel with the Defendant. * P. 251

Dalton againſt *Sudde.*

I am no Traitor, I have ſeen you in Rebellion. S. C. 1 Sid. 381. 2 Keb. 411.

CASE for ſaying of him, being a Burgeſs of Parliament, and a Juſtice of Peace, *You are a ſcurvy Fellow*; *I am no Traitor, I have ſeen you in Rebellion*: After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Words are not actionable; That *I am no Traitor* are not, becauſe negative, and not ſpoken of the Plaintiff: And *I have ſeen you in Rebellion*, are not, for *Rebel* is not. *Cro. Eliz.* 621, 638. 878. For it may be underſtood of a Commiſſion of Rebellion out of Chancery: Alſo, they are ſpoken of Times paſt, and perhaps a general Pardon has been ſince he was in Rebellion, if it ſhall be ſo intended. See *Hob. Cuddington* againſt *Wilkins*: But Judgment was given for the Plaintiff; for by the Oppoſition of the Words, *I am no Traytor, I have ſeen you in Rebellion*, it cannot be intended but of a traiterous Rebellion; and tho' they are not ſpoken poſitively, That the Plaintiff had been a Traitor, or had been in a traiterous Rebellion: Yet by the Connexion and Intention of the Words, the By-ſtanders cannot intend any other Thing, but that he ſuppoſed the Plaintiff had been in a traiterous Rebellion; and if any Pardon had been afterwards, the Defendant ought to have ſhewn it in Pleading, as was done in *Cuddington* and *Wilkins*'s Caſe, elſe the Court will not intend it. *Levinz* for the Defendant, *Bigland* for the Plaintiff.

Hob. 67, 81, 294. Salk. 696. Ld. Raym. 812. 4 Bac. Abr. 483, 511. Rol. Abr. 69, 72. 1 Sid. Rep. 132.

Criſpe

* P. 252 * *Criſpe* againſt *Mayor and Commonalty of* Berwick upon Tweed.

Covenant to repair a Houſe in *Berwick*, tried in *Northumberland*. 1 Mod. 36, 37. 1 Sid. 381. 2 Sid. 36, 37. Raym. 173. 1 Vent. 58, 90. 2 Keb. 414, 676. 1 Mod. 6, 7. Moor 412. Cowp. 47.

COVENANT, on a Covenant ſuppoſed by the Declaration to be made at *York*, for Enjoyment of Lands in *Berwick*, and iſſue, That he did enjoy. The Plaintiff ſuggeſts, That *Berwick* is in *Scotland*, and that *Belford* in *Northumberland* is the next *Engliſh* Vill; and prayed a *Venire facias* from *Belford*, and had it, and the Iſſue was tried in *Northumberland*, of the Neighbourhood of *Belford*, and a Verdict for the Plaintiff. And now it was moved in Arreſt of Judgment, That *Berwick* is in *Scotland*, and ruled by the Laws of *Scotland*; and Facts done there are not triable by the Laws of *England*, whereto it was anſwered, If it ſhould not be ſo tried, there would be a Failure of Juſtice: For, 1. The Mayor and Commonalty of *Berwick* cannot be ſued in *Berwick*, for then they would be Judges and Parties. 2. A Fact done in *England* ſhall be tried in and by the Laws of *England*, and not by the Laws of *Scotland*. They alſo cited 19 *H.* 6. 12. That ſo it was of Things in *Wales*, before the Union of *Wales* to *England* by the Stat. *H.* 8. And that the Caſe *Hill.* 41 *Eliz. Rot.* 630. between *Shepherdſon* and *Chambers* did not paſs *ſub ſilentio*, as was objected: But to this was objected, That there the Deed was laid to be made at *Belford*, and the Trial was of *Belford*. Whereupon the Court inclined, That if it might be tried in *England*, it ought to be tried at *York*, where the Deed is laid to be made, and not at *Belford*; and it was adjourned. And afterwards in *Hill.* 21 & 22 the Caſe was argued again, and 3 *Cro.* 465. was cited, That ſo it was of *Wales* and *Ireland* at the Common Law; and Mr. *Liveſay*, the Secondary ſaid, That he remembered ſuch a Caſe of *Berwick* ſo adjudged and affirmed in Error; but it was further objected, That one of the Plaintiffs was dead after the Verdict, and before the Day in Bank; to which it was anſwered, That no Continuances being entered, the Judgment may now be entered as at the Day in Bank, without any Continuances; and *Liveſay*, the Secondary ſaid, That ſo it

it had been frequently done, as well in caſe of the Death of the Plaintiff, as of the Defendant, * and ſo the Court inclined to do; but it was further adjourned, and afterwards, as I heard, Judgment was given for the Plaintiff.

* P. 253

Biſhop againſt *Corbet.*

A Prohibition was prayed to the County-Court, for ſtaying a Suit there, in Debt for Tithes on a *Juſticies*, for that it is not *Debitum ex contractu*, but *ex delicto*, founded on a Statute, whereof the Sheriff has no Power to hold Plea; and the *Juſticies* does not enlarge his Juriſdiction to other Actions, but only enables him to hold Pleas of greater Sums than by his ordinary Juriſdiction he could: And it was further moved, That the Prohibition in this Caſe is grantable, without a Suggeſtion entered, becauſe it is in Nature of a *Superſedeas*; which the Court denied; but they held this to be a Caſe very conſiderable, and therefore directed a Suggeſtion and a Declaration thereupon, that the Defendant might plead or demur thereto, ſo that the Caſe might come judicially before the Court.

Debt for Tithes, if it lies in the County Court.

No Prohibition to inferior Courts without a Suggeſtion.

Sir *Henry North* againſt *Cox, Com' Banco.*

TRESPASS by the Lord of a Manor: The Defendant preſcribes as Tenant to have the ſole Paſture of a Cloſe, *omni tempore anni*; and the Court was divided in Opinion, Whether this Preſcription, to have the ſole Paſture of a Cloſe of the Lord *omni tempore anni*, was good? *Wylde* and *Archer* held it good. *Vaughan*, Chief Juſtice, and *Tyrrel* to the contrary; and it was intended to be adjourned into the Exchequer-Chamber, but it was not. See the Caſe in *Vaughan's Rep.* 251. And afterwards the ſame Caſe was brought in the King's Bench, and the Preſcription there adjudged good.

Preſcription to have the ſole Paſture of a Cloſe the whole Year.

Vide Poſt, 286, &c. ib. & 2 Lev. 2. 1 Vent. 123, 163, 283, &c. Vide Ante, 176. Poſt, 268, 269. 1 Lev. 253, 268. 2 Saund. 320, 324.

1 Mod. 74. Cart. 199. 1 Vent. 383, to 398. 2 Show. 9.

Sir

* P. 254 * Sir *John Lenthall* againſt *Cooke.*

Marſhal of the King's Bench is within the Stat. 23 H. 6. yet may take an Obligation for better Security, and traverſe the Eaſe and Favour.
S. C. 1 Sid. 389.
1 Saund. 161.
1 Vent. 237.
1 Keb. 422.
Vide Ante, 86, 209.
2 Lev. 103.
1 Mod. 111.
1 Saund. 161, 162, 318.

DEBT on Obligation of 3000*l.* conditioned, That if *Algernon Payton*, a Priſoner in the King's Bench, remains a true Priſoner, without making any Eſcape, that the Obligation ſhould be void; the Defendant pleads the Stat. 23 *H.* 6. and that *Payton* was a Priſoner in Execution, and the Obligation made for Eaſe and Favour; on which the Defendant demurs; and it was argued, That Priſoners in Execution ought to be kept in ſafe and ſtreight Cuſtody, and an Obligation for giving hem Liberty is void at the Common Law, *Plowd.* 64. *b.* and 10 *Co. Beaufage*'s Caſe; alſo, the Marſhal of the King's Bench is within the Stat. 9 *Co.* 104. *b.* And the traverſing of the Eaſe and Favour was immaterial, for it cannot be intended to be taken for any other Thing, and the Traverſe ought to be, That he took it *colore officii*: But to this it was anſwered and reſolved, That the Traverſe of the Eaſe and Favour is the moſt material Thing, and it may well be intended to be taken for the better Security of his Impriſonment. For the Priſoners of the King's Bench are ſo numerous, that the Houſe cannot hold them, but they are permitted to lodge within the Rules, and therefore there is good Reaſon to take Security for their true Impriſonment, and conſtant Uſage has been to take ſuch Obligations; and *Hill.* 19. *Jac.* 1. *B. R. Rot.* 1202. was produced in Court, where in the like Caſe an Iſſue was taken on a Traverſe of the Eaſe and Favour; and thereupon Verdict and Judgment for the Plaintiff: But by the Demurrer here, the Defendant had confeſſed the Traverſe, and (admitted) that it was not for Eaſe and Favour; and therefore Judgment was given for the Plaintiff.

* P. 255 * *Suagter* and his Wife againſt *Davies.*

Witch, I will bang you for it, is actionable.
S. C. 1 Sid. 386. 2 Keb. 430. Vide 3 Lev. 166, 394, 395. *&c. ibid.*

CASE for ſaying of the Plaintiff's Wife, *You are a Witch, and I will ſwear it; and if you croſs me too much, I will hang you for it*: After Verdict for the Plaintiff

tiff it was moved in Arreſt of Judgment, That *Witch* is not actionable, without ſaying that ſhe had bewitched ſome Perſon; for elſe it is not Felony by the Statute. But by the Court, although that the Word *Witch* alone is not actionable for the Reaſon aforeſaid; yet when it is further ſaid, *and I will hang you for it*, that ſhews what *Witch* he intends, *viz.* ſuch a one as had by her Witchcraft committed Felony. And Judgment was for the Plaintiff.

Sheape againſt *Culpeper*.

In Replevin, the Jury not inquiring of the Value of the Rent arrear, it cannot be ſupplied by a Writ of Inquiry.

S. C. 1 Sid. 380. 1 Vent. 40. Raym. 170. 2 Keb. 409, 431, 536. Bull. N. P. 58.

IN Replevin, an Avowry was for Rent granted by *J. S.* On Iſſue *Non conceſſit*, the Jury inquire of the Value of the Cattle, but do not inquire what Rent was Arrear, ſo as the Beaſts may be ſold to ſatisfy it according to the New Statute. *Car.* 2. *cap.* And now it was moved to have it ſupplied by a Writ of Inquiry, as was done in *Speeott's* Caſe in 5 *Co.* in a *Quare Impedit.* (But by) the Court, He may have his Judgment (there) according to the Common Law; but the Words of the Statute in this Caſe being, *That it ſhall be inquired by the ſame Jury which tries the Iſſue*, they doubted if it might be ſupplied by a Writ of Inquiry, but it being a new Caſe they would adviſe. And afterwards in *Trinity* Term 21 *Car.* 2. it was reſolved after ſeveral Debates, That it cannot be ſupplied by a Writ of Inquiry.

Vide 1 Salk. 205, 206.

Wheately againſt *Lane*.

Executor charged in *Debt & Detinet* on a *Devaſtavit*.

S. C. 1 Saund. 216. 1 Sid. 397. 2 Keb. 544, &c. Ante 231, 232. Vide ante 245, 250, 147. &c. *ibid.* 2 Lev 40, 110, 113, 145, 189, 209. 5 Com. Dig. 201. 2 Bac. Abr. 246, 389, 442. Doug. 4. 1. Term Rep. 126. Vide ante 147, 232, 245. Hob. 206. 1 Sid. 397. 2 Sid. 104. 1 Saund. 219. 2 Lev. 40, 110, 189. Cart. 2. 1 Lutw. 670.

DEBT in the *Debet & Detinet*, on a Judgment againſt an Executor, and counts, That he had waſted divers Goods to the Value of the Debt, but

does

* P. 256 does not ſhew the Certainty of the Goods * waſted. The Defendant demurs on the Declaration, and it was argued, That this Action lies not in the *Debet*, for if ſo, he ſhall, (may) charge the Executor of an Executor, which cannot be, becauſe it is only a perſonal Tort; and 9 *H.* 6. 9. 3 *Cro.* 530. 11 *H.* 4. 56. were cited as Authorities for the Defendant: To which it was anſwered, That this is more than a perſonal Tort, for he is charged here with the having of Goods and converting them to his own Uſe: The Executors of a Sheriff ſhall not be charged for an Eſcape; but if the Sheriff levies the Money and detains it, his Executors ſhall be charged for it. 1 *Cro. Parkinſon* againſt *Guildford*, and as to the Caſe 11 *H.* 4. there is no *Devaſtavit* laid. But to maintain this Action were cited 11 *H.* 6. 7, 8, 16, 17, 18. where on a *Devaſtavit* the Executor is chargeable in the *Debet & Detinet*, held by *Strange*, *Paſton* and *Rabington*. And in *Mich.* 1655. *B. R. Rot.* 711. between *Cory* and *Thinne* it was ſo adjudged; and ſo, as was ſaid, had been *Medgly*'s Caſe in the Common Pleas before that adjudged; and *Harewell* and *Ellis*'s Caſe in *B. R. Rot.* 546. *Paſch.* 15. *Car.* 2. And of ſuch Opinion were the whole Court, and gave Judgment for the Plaintiff, *Pemberton* for the Defendant.

Anonymous.

Execution to *Cheſter*, out of the King's Bench. Poſt. 291.

IT was moved to have Reſtitution of Goods, levied by a *fieri Facias* out of this Court in the County-Palatine of *Cheſter*, on a Judgment originally had in this Court; for that on ſuch a Judgment here no *Fieri Facias* lies to a County-Palatine, 21 *H.* 8. 35. But where a Judgment is removed hither for Error, and here affirmed, Execution may iſſue out of this Court. But the Court denied the Motion, and held, That Execution may well iſſue out of this Court to the County-Palatine, on a Judgment originally given in this Court.

Bolton

* *Bolton* againſt *Fenne.* * P. 257

Aſſumpſit by a Treaſurer of the Navy's Clerk, That if he would not trouble his Maſter for the Payment of Tickets, &c. (whereof the Plaintiff was poſſeſſed) that he would pey them, a good Conſideration. S. C. 1 Sid. 392. 2 Keb. 437. 1 Danv. 61. Vide 1 Roll. Rep. 27. 1 Sid. 41, 89. 1 Vent. 12, 40. 1 Lev. 71, 273. 1 Mod. 25. 2 Lev. 119. 1 Salk. 25. 8 Mod. 267. 2 Srr. 1211.

ASSUMPSIT and declares, That whereas the Plaintiff was poſſeſſed of ſeveral Tickets for Seamens Wages due to them, and had ſolicited Sir *George Carteret*, Treaſurer of the Navy for the Payment of them, who had ordered the Defendant his Clerk to pay them; the Defendant on the Plaintff's requeſting him to pay them, in Conſideration that the Plaintiff would no further trouble Sir *George Carteret* for the Payment of them, did aſſume (*i. e.*) promiſe to pay them to the Plaintiff. After Verdict for the Plaintiff on *Non Aſſumpſit*, it was moved in Arreſt of Judgment, That here is not any Conſideration. *Firſt*, For that it does not appear, That the Plaintiff had any Intereſt in the Money, nor Authority to receive it; for he does not ſhew any Aſſignment of the Bills, nor Letter of Attorney or other Authority for the Plaintiff to receive it. *Secondly*, That though ſhe would no further trouble Sir *George*, yet the Owners of the Money may do it. But by the Court, After a Verdict it ſhall be intended, That the Plaintiff either had an Intereſt in the Bills by Aſſignment, or Authority from the Seamen to receive the Money, and that the Defendant was ordered by Sir *George* to pay them; and that the Intent of this Promiſe and Forbearance was no other but that the Plaintiff ſhould go no more to Sir *George* for the Money, and thereby diſcover that the Defendant had not paid it according to Sir *George*'s Order.

The King againſt *Twiſleton* and others.

Information for ſeducing an Heireſs to marry him. S. C. 1 Sid. 387.

INFORMATION, for that the Defendants uſing to come and to be entertained at the Houſe of another, *Twiſleton* ſeduced his Daughter, being his Heir apparent to a great Eſtate, to marry him; and that the Defendants *Twiſleton*, and the others, without the

2 Keb. 432, 438. Vide 1 Sid. 363. 3 Keb. 101, 193, 252, 708.

Father's Aſſent, carried the Daughter from her Father's Houſe, and the Defendant *Twiſleton* married her: And on a Trial at Bar it apeared in Evidence, That the Defendant *Twiſleton* being a remote Kinſman, and of ſmall Fortune, and being frequently entertained at the
* P. 258 Father's Houſe, made Love to the Daughter; but * no Proof was of any Seducements, but common Compliments among young People; and it was offered in Evidence, That the Encouragement to this Affair proceeded from the Daughter, whom the Father intended to marry to another Kinſman of his own Name, of a more conſiderable Eſtate, whom the Daughter did not love ſo well: And that the Daughter by Agreement between her and the Defendants, went from her Father's Houſe to a Place appointed, and there met the Defendants, and was married to the Defendant *Twiſleton*; whereupon the Court directed the Jury, That the Daughter being of tender Years, *viz.* about ſixteen, and a great Fortune, this was an Offence in the Defendants within the Information, and that they ought to find them guilty, which they indeed did, but it ſeemed with ſome Doubt: And afterwards, before any Fine impoſed, the Parties agreed.

Term. Sanct. Hill.

ANNO

20 & 21 Car. II. in Banco Regis.

Thurſby againſt *Plant.*

COVENANT, and declares, That the Earl of *Lincoln* was ſeized of Lands in *Lincolnſhire*; and at *London* made a Leaſe rendering Rent, and that the Tenant covenanted to pay the Rent, and that afterwards the Earl granted the Reverſion to the Plaintiff, and for Non-payment of the Rent the Action was brought and laid in *London*. The Defendant pleads a Surrender, on which Iſſue was, and a Verdict for the Plaintiff; and it was moved in Arreſt of Judgment, That the Action being brought by the Aſſignee of the Reverſion ought to be laid in *Lincolnſhire*, where the Land lies, (upon the Privity of the Eſtate) and not at *London*, upon the Privity of Contract) where the Leaſe was made, and cited 1 *Cro. Board* againſt *Cudmore*; Debt for Rent ought to be brought by the Aſſignee in the County where the Land lies, on the Privity of Eſtate: To which it was anſwered and reſolved by the whole Court, That Debt is maintainable only upon the Privity of Eſtate, and goes with the Reverſion at Common Law,

Aſſignee of a Reverſion ſhall have Covenant againſt the Leſſee where the Leaſe was made, otherwiſe of Debt. S. C. 1 Sid. 401. 1 Saund. 230, 237. 1 Vent. 10. 2 Keb. 439, 448, 463. 2 Danv. 241, 242. Vide 3 Mod. 338. 5 Co. 18. Cro. Jac. 522. 1 Saund, 159, 243. 1 And. 81, 82.

Owen 41, Raym. 250. 1 Vent. 10. Moor. 159, 243, 876. Ante 22. Cowp. 243. Doug. 187, 461, 764. 1 Com. Dig. 574. 3 Term. Rep. 627.

and that an Aſſignee could maintain it before the Statute upon the Privity of Eſtate, and Perception of the Profits; but Covenant did not go to the Aſſignee before the Statute, becauſe it lies only on the Privity of Contract; and though now by the Statute the Covenant paſſes to the Aſſignee, yet the Nature thereof is not altered by the Statute, but it is aſſignable only as a Contract, and therefore ought to be brought where the * Contract was made; and there is a great Difference between Debt for the Rent which ariſes out of the Profits of the Land, and Covenant which is a collateral Thing, on which only Damages are to be recovered. 2 *Cro. Batchellor* againſt *Gage.* Covenant lies againſt the Leſſee after aſſignment of the Term, and Acceptance of the Rent from the Aſſignee; but Debt does not lie. 2 *Cro. Brett* againſt *Cumberland,* and *Hill.* 15 *Car.* 2. *B. R. Rot.* 1258. That Covenant lies on the Privity of Contract after Aſſignment; whereupon Judgment was given here for the Plaintiff by the whole Court, on which the Defendant brought a Writ of Error. But as I heard the Parties agreed. *Jones* for the Plaintiff, *Sanders* for the Defendant.

* P. 260

Sir *Theophilus Biddolph* againſt *Temple.*

Debt on a Judgment in Covenant for the Damages recovered, and Judgment, and in Error on the Judgment in Debt, Bail, on the Stat. 3 *Jac.* 12 Ante 245, 255. Poſt. 268,

DEBT on an Obligation for Performance of Covenants, and a Breach aſſigned, Iſſue, and Damages, and Judgment for the Plaintiff, and Debt brought on that Judgment, and Judgment by Default; and Error being brought of this laſt Judgment, the Queſtion was, Whether the Plaintiff in the Error ſhould find Bail on the Stat. 3 *Jac.* 1? For it was agreed, not to be within the Stat. of 13 *Car.* 2. And it was objected, That the Original of this Action being founded upon Covenant, was not within any of the Words of the Stat. of 3 *Jac.* 1. which mentions Actions of Debt for Payment of Money only, or for Rent or Contract for Money, and that this is none of them; and hereto *Twyſden* inclined. But by *Kelynge* and *Moreton,* This laſt Action on which the Error is brought was for Money only recovered by the firſt Judgment, and within the

the Words, *Contracts for Money*; and ruled, That Bail ſhould be found. See *Mich.* 29. *Car.* 2. *B. R. Taylor* againſt *Baker*, Judgment in Debt on an Obligation for Payment of Money, and Debt brought upon that Judgment, and another Judgment thereupon; and in Error on the latter Judgment it was doubted, whether Bail ſhould be found.

2 Jo. 97, 98. Q. 2 Lev. 203.

* *Barnes* againſt *Bruddel*.

* P. 261

CASE for ſaying of her, being a Virgin of good Fame, *She was with Child by* Simons; whereby ſhe was in her Parents Diſpleaſure, and in Danger of being put out of their Houſe: Afterwards Judgment was ſtayed, for that the Words are not actionable, there being no Loſs of Marriage, which was the ſole Reaſon of *Anne Davies*'s Caſe; and the Caſe in 1 *Roll.* 35. An Action for ſaying, *She was with Child*, whereby ſhe loſt the Society of her Neighbours, held not to be Law; but that 3 *Cro.* 639. *She had a Child, and if ſhe have not a Child ſhe has made it away*, may be Law, becauſe it imports Felony.

But *Note*, In that Caſe loſs of Marriage is laid alſo.

She had a Child, whereby ſhe loſt the Favour of her Parents, not actionable. S. C. 1 Vent. 4. 2 Keb. 451. 1 Sid. 396. Vide 1 Rol. Ab. 19, 37. Cro. Car. 269, 338. 1 Vent. 4. 1 Com. Dig. 185. 4 Bac. Abr. 501.

Parker againſt *Amys*, &c.

DEBT againſt two as Executors; they plead a Judgment againſt one of them as Adminiſtrator: The Plaintiff demurs; and it was objected, 1. Becauſe th Action and Judgment is againſt him as Adminiſtrator, which he could have avoided by pleading in Abatement, That he was Executor. 2. That was only againſt one, which does not lie without the others; to which it was anſwered and reſolved, That the Judgment is well pleadable in Bar; and as to the firſt was cited 3 *Cro.* 646. adjudged in Point, and the Caſe of

Debt againſt two Executors, they plead a Judgment againſt one as adminiſtrator, and well. S. C. 1 Sid. 404. Vide ante, 157, 200, 201. Cro. Eliz. 41. 1 Danv. 723.

Vide Ravm. 153. Vaugh. 104. 1 Mod. 165. Cro. Eliz. 646, 575. 2 Lev. 40. 4 Mod. 296 3 Lev. 311. 2 Mod. 36. 1 Lutw. 241. Cart. 221. Stra. 409.

Wheatly

Wheatly and *Lane* in this Court, *ant* 231, 255. And as to the 2d Point, 3 *Cro.* 437. And although the Action was not well brought, yet the Defendant was not obliged to plead in Abatement, and put himself to greater Charge, for as much as there was a true Debt due, and a Recovery had upon the Right of the Debt.

* P. 262

* *Wilmott* againſt *Nixon.*

Caſe againſt a Foreigner, for uſing a Trade in a Market-Town, whereby the Plaintiff, a Freeman, had leſs Trade. S. C. 2 Keb. 464. Cro. Eliz. 392. N. Lutw. 548.

CASE, That whereas in *Derby* there is a Cuſtom, That every Butcher in *Derby* having ſerved an Apprenticeſhip for ſeven Years, might uſe that Trade without Damages of another, or from another; that the Defendant not being a Freeman nor having ſerved an Apprenticeſhip, ſold Fleſh in *Derby* ſuch a Day, not being a Market-Day, whereby the Plaintiff could not ſell ſo much as otherwiſe he might to his Damage, &c. The Defendant demurs: 1*ſt*. Becauſe the Cuſtom is not laid poſitively in Fact, That he did uſe; but only potentially, That he might uſe 22 *E.* 4. 2*dly*. There is no By-Law to reſtrain Foreigners from ſelling; and without a Cuſtom or By-Law, any Foreigner may ſell in Market-Towns, except on the Market-Days. 3*dly*. That he ſold Fleſh, is not ſufficient; for it may be a Horſe, or a Dog: And upon theſe Exceptions Judgment was given for the Defendant.

Forth againſt *Stanton.*

A Stranger promiſes a Creditor, if he will accept him for his Debtor, to pay, &c. S. C. 2 Keb. 465. 1 Saund. 210.

ASSUMPSIT, for that the Defendant's Teſtator being indebted to a Stranger, who aſſigned the Debt to the Plaintiff, and authoriſed him to receive it; the Defendant being the Executor, promiſed the Plaintiff, That in Conſideration he would accept him for his Debtor, to pay it to the Plaintiff: And upon Demurrer it was adjudged for the Defendant. For here

1 Jo. 87. Vide ante, 248. 1 Vent. 9, 15, 152. 2 Vent. 71. Hard. 73. Winch 7. Style 249. 1 Sid. 396. 1 Mod. 12. 1 Rol. Ab. 29, 60. Ante, 188. Bur. Rep. 2630. Doug. 269. Cowp. 548.

is

is no Conſideration of Forbearance, but to accept him for his Debtor, which he is not; for he is ſtill Debtor to the firſt Creditor: And the Authority to receive it is determined by the Death of the Teſtator, and differenced it from *Ruſſel* and *Haddock*'s Caſe *ante*, where he who had the Authority to receive the Debt before.

Jory againſt *Pawly*. * P. 263

EJECTMENT, and on Not guilty and a Special Verdict the Caſe was: A Copyholder of Inheritance is convicted of Felony, and has Clergy allowed before Attainder; and if this be a Forfeiture of his Eſtate, ſo that the Lord may enter without a Special Cuſtom: And it was argued, that it is, for it is a Determination of the Will. 5 *Co. Oland*'s Caſe, 4 *Co. Brown*'s Caſe. 1 *Leon.* 1. A Copyhold is forfeited by the committing of Felony, 1 *Bulſt.* 13. A Copyholder convicted of Felony is diſabled to be of a Jury, and ſo he cannot do his Service to the Lord. But on the other Side it was ſaid, That a Conviction does not diſable from ſerving on a Jury; and ſo inclined the Court; and as to the Caſe in 1 *Leon.* there is a Cuſtom found, which is not ſo here; and the Court inclined ſtrongly, That it is not any Forfeiture without a Special Cuſtom: But on the Importunity of Counſel it was appointed to be argued again at Bar the next Term.

A Copyholder convicted of Felony has Clergy. Q. If a Forfeiture of the Copyhold. S. C. 2 Keb. 451, 466. Vide ante 63.

Salmon againſt *Smith*.

DEBT for Rent, and declares on a Leaſe of four Acres of Land, at 5*l.* Rent, and for Rent arrear he brought the Action: The Defendant pleads to Part *Nil debet*, and to the Reſidue he pleads, That the Leaſe was of the ſaid four Acres, and of one Acre more; and that before the Rent was arrear the Plaintiff

Debt on a Leaſe of four Acres; the Defendant pleads that the Leaſe was of five Acres, and an Entry in the 6th, he ought to traverſe the Leaſe of the four Acres only. S. C. 2 Keb. 467 1 Saund. 306. 1 Sid. 405. Raym. 175.

tiff

tiff entered into the fifth Acre: On which the Plaintiff demurs; and the Reaſon ſhewn on the Argument was, for that he did not traverſe, that he demiſed the four Acres only: But on the other Side it was ſaid for the Defendant, That the traverſe ought to have come on the Plaintiff's Part, *viz.* he ought in his Replication to have maintained the Leaſe in the Declaration, and have traverſed, that he demiſed the fifth Acre. To * which it was anſwered, That that would be a Departure from his Declaration, and therefore the Traverſe ought to be on the Defendant's Part; for when he pleads another Leaſe than that upon which the Plaintiff declared, he ought to traverſe the Leaſe on which the Plaintiff declared, *viz.* to plead the Leaſe of the fifth Acre, *abſque hoc* that he demiſed the four Acres only: And ſo held the Court, and gave Judgment for the Plaintiff.

* P. 264

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* P. 265

* Termino Paſchæ,

ANNO

21 Car. II. in Banco Regis.

Man againſt *Cooper.*

ASSUMPSIT for Money received to his Uſe, and Verdict and Judgment for the Plaintiff; and thereupon Error brought, and it was moved to have it allowed

Act of Parliament to continue three Years and to the End of the next Seſſions, ſhall continue till the End of the next Seſſion which begins after the three Years. 8. C. 2 Keb. 495.

without

without Bail, for the Statute 17 *Car.* 2. which appoints Bail in this Caſe, was only to endure for three Years, and to the End of the next Seſſion of Parliament; and that the next Seſſion after the three Years, ended the firſt of *March*, 21 *Car.* 2. But by the Court, Although that this laſt Seſſion ended the firſt of *March*, 21 *Car.* 2. and that was after the three Years, yet that Seſſions commenced within the three Years, and the Statute is to be intended of a Seſſion which commenced after the three Years ended afterwards; and not of a Seſſions which commenced within the three Years, and ended after the three Years. And ſo it was reſolved in the Common Pleas this very Term, as *Lockhaut* the Prothonotary informed me.

Stone's Caſe.

A Writ of Privilege was granted for exempting him from being Reeve to the Lord of the Manor of *Harrow on the Hill*, to collect the Lord's Rents there, he being an Attorney of this Court; and though it was objected, That * he was a Copyholder, and was by Cuſtom to ſerve, as a Thing incident to his Eſtate, created by the ſame Cuſtom, and alſo ſaid, That he may execute it by Deputy; yet the Court granted the Writ: For as to the firſt it was ſaid, That the Privilege of this Court is as ancient as the Cuſtom of any Manor; and as to the ſecond, he is reſponſible for his Deputy.

Attorney Copyholder, privileged from being Reeve by Cuſtom.
S. C. 1 Ven. * P. 266
16, 29.
2 Keb. 486, 491, 508.
Kaym. 179.
Vide ante 233.

Term.

Term. Sanct. Trin.

ANNO

19 Car. II. in Banco Regis.

Jurado againſt *Gregory.*

Suit here for executing a Sentence in the Admiralty of *Spain*, for a Thing done upon the Land. S. C. 1 Vent. 32. 1 Sid. 418. 2 Keb. 511, 610. Vide ante, 243. Trin. 20. Turner & Cary. & Raym. 473. 2 Show. 338. 1 Vent. 1, 32, 308. Hob. 12, 115. 1 Salk. 35. 6 Mod. 79. 2 Jon. 66, 67. 2 Will. 23.

A Prohibition was prayed to the Admiralty on a Suggeſtion, That the Contract was made on Land at *Malaga* in *Spain*, to receive Merchandizes on Board a Ship there, and to carry them to another Place: To which it was ſaid, That though the Contract was ſo made, yet there was a Sentence on a Suit in the Admiralty in *Spain*, and the Suit here is no more than to execute that Sentence here, and in ſuch a Caſe no Prohibition lies; and cited 1 *Roll. Abr.* Tit. *Courts*, *ſect. Admiralty*, to be in Point; and to that the Court inclined: But then it was ſaid, That the Sentence there was not peremptory and final to pay any Thing for the Non-performance, but only Interlocutory, That he ſhould receive and carry the Goods according to the Agreement; but here the Suit is for Damages for not receiving and carrying, for which an Action on the Caſe lies: Whereupon it was ruled, That the Plaintiff ſhould declare on the Suggeſtion, ſo that on Pleading the Matter might come judicially in Queſtion.

Caſtle

* *Caſtle* againſt *Willer* Executor of *Willer*.

* P. 268

THE Defendant was ſued in the Palace-Court as Executor, and was there compelled to find Bail according to the Courſe of that Court; he removes the Cauſe by *Habeas Corpus*, and now the Queſtion was, Whether he ſhould find Special Bail here? And reſolved, He ſhould not: For tho' it be generally uſed, That when a Cauſe is removed by *Habeas Corpus* to find Bail in all Caſes where Bail is found in the Inferior Court, yet this ſhall not extend to the Caſe of an Executor, where the Cauſe did not require Special Bail by the Courſe of the Court, except in the Caſe of a *Devaſtavit*. But in other Caſes where Special Bail is found below it ſholl be found here, altho' the Cauſe of Action be of a leſs Sum, than, by the Courſe of this Court, Special Bail is to be found.

An Executor finds Bail in Inferior Court, the Cauſe being removed he ſhall not find Bail above: See the contrary held by *Twyſden*, *Ante* 245. *Fitz-Williams* againſt *More*. S. C. 1 Sid. 418. 2 Keb. 512. Vide Lit. Rep. 5. 81. 3 Bulſt. 317. 1 Sid. 63, 368, 418.

Potter againſt *North*.

IN Replevin the Defendant makes Conuzance as Bailiff of Sir *Henry North*, for Damage feaſant in his Freehold in *Delf*, Parcel of a great Farm within his Manor of *D*. The Plaintiff in Bar of the Conuzance ſaid, That there are divers Freehold and Copyhold Tenements within the Manor, and that he is ſeized of a Freehold Tenement there; and that he, and the other Freeholders, and all thoſe whoſe Eſtates they have, Time out of Mind, *&c.* together with the Copyholders, have had *ſolam & ſeparalem paſturam* of the ſaid Place, *omni anno omni tempore anni*; and then he pleads a Cuſtom, That the Copyholders, together with the Freeholders, Time whereof, *&c.* have had *ſolam & ſeparalem paſturam omni anno omni tempore anni*, *&c.* on which Plea in Bar the Plaintiff demurs generally: And *Firſt*, Exceptions were taken to the Pleading, *viz.* 1. The Preſcription in himſelf, and all the Freeholders, is not good, for each ought to preſcribe for himſelf, and not for himſelf, and all the other Freeholders. 2. * He preſcribes

Preſcription for the ſole Paſture for all the Year. S. C. Ante, 253. 1 Vent. 383. 1 Saund. 350. 2 Keb. 513, 517. Vaugh. 251. Cart. 199. Vide 2 Saund. 324. 2 Lev. 2. 1 Mod. 74. 2 Keb. 758, 842. 1 Vent. 123, 163. 2 Lev. 2. Ante, 176, 253. 2 Show. 9.

* P. 269

A Prescription by Freeholders and Custom by Copyholders joined in a Plea.

prescribes for himself, and all the Freeholders, together with the Copy-holders; and yet he lays a Custom for the Copyholders, together with the Freeholders, and so mixes a Prescription and a Custom together, which cannot be; for the one is laid in the Person, and the other in the Place. But he ought to have said, That he, and all those whose Estate he has, together with the Freeholders, and Copyholders, Time out of Mind, *&c.* have had, *&c.* But the Court over-ruled the Exceptions, on a Case between *Kettleborough* and *Wells* *Trin.* 1654. *Rot.* 549. where such Pleading was adjudged good. And (then) as to the Matter, it was argued, That the Prescription to have *solam pasturam*, and exclude the Lord, is not good; for which Purpose were cited *Fitz. Prescription* 51. *Ent.* 45. *Co. Lit.* 122. *Yelv.* 129. 2 *Cro.* 208. *Yelv.* 184. 2 *Cro.* 256. from whence they inferred, That the Tenants might prescribe to have Part of the Profits for Part of the Year; but here it is to exclude the Lord from all the Profits, and is like a Custom, to have all the Common, and exclude the Lord. But to this it was answered, and resolved, That this is not to exclude the Lord from all the Profits, for he shall have the Mines, the Trees, *&c.* and it is not like a Prescription to have the whole Common, and to exclude the Lord, for that is repugnant; for in all Cases of Common the Lord is to intercommon with the Tenants, in the Nature of Commoner, and therefore to exclude the Lord is repugnant to the Essence of Common; and Judgment was given for the Defendant. See *Vaugh. Rep.* 251. where the Court was divided in a like Case, *in Communi Banco, viz. Vaughan* and *Tirrel* against the Custom, and *Archer* and *Wylde* for it. And see hereafter in *Easter Term*, 22 *Car.* 2. *B. R.* between *Hopkins* and *Robinson*, such a Custom admitted to be good.

* P. 270

* *Freeman* against *Barnes.*

Lease for 100 Years in Trust for him in Reversion: He in Reverfion Leases for 54 Years, and levies a Fine to corroborate for 100 Years, he is barred thereby. S. C. 1 Sid. 349, 458. 1 Vent. 55, 80, 88. 2 Keb. 521, 650, 597. Cart. 161, 195. Hard. 400, 401, *&c.* Hard. 400, 401.

ERROR of a Judgment in Ejectment in the Common Pleas, where on a Special Verdict the Case was this. The Marquess of *Winchester* being seised in

Fee

Fee, made a Leaſe for 100 Years to attend the Reverſion, the Leſſee actually enters and makes a Leaſe for 54 Years to the Defendant in the Ejectment, and for Confirmation of the Term of 54 Years, levies a Fine *ſur Conuzance de Droit*; the Leſſee for 54 Years enters, and the Leſſee for 100 Years being out of Poſſeſſion, aſſigns his Term to the Plaintiff in Ejectment, againſt whom Judgment was given in the Common Pleas, whereupon he brought Error, and two Points were twice argued at the Bar in this Term, and *Michaelmas* following, by *Jones* and *Levinz* for the Plaintiff in Error, and by *Winnington* and *Finch*, the King's Solicitor, for the Defendant; and two Queſtions were made, *1ſt*, If the Fine, and five Years Poſſeſſion barred the Leaſe for 100 Years? *2dly*, If the Aſſignment by the Leſſee for 100 Years, the Leſſee for 54 Years being in, and he out of Poſſeſſion, be good? And as to the firſt, It was argued for the Plaintiff in the Error, That the Marqueſs, by his Entry on the Leſſee for 100 Years, was not a Diſſeiſor, the Reverſion being in himſelf, but was Tenant at Will to the Leſſee for 100 Years. *Lit. Sect.* 462, 463. *2dly*, That the Marqueſs by making the Leaſe for 54 Years, cannot be a Diſſeiſor for the ſame Reaſon. And the Leſſee for Years, or at Will of a Stranger, making a Leaſe for Years, is not a Diſſeiſor without an Intent, or at moſt at the Election of the Party. *Co. Lit.* 153. *b. Cro. Car. Blunden* againſt *Baugh*. 2 *Cro. Powſly* againſt *Blackman*. *3dly*, That the Fine is no Bar, becauſe the Leaſe for 100 Years was not diſplaced (diveſted) either before, or by the Fine. 5 *Co. Rep. Seffin's* Caſe. 9 *Co. Podger's* Caſe. The Conuzor being Tenant at Will, it was not ſuch an Eſtate as would paſs by the Fine; for if Tenant at Will levies a Fine, *That the Parties had nothing*, &c. may be pleaded thereto. But (here) the Conuzor had alſo the Reverſion in Fee which paſſed by and ſatisfied the Fine, but did not touch the Leaſe at Will, or for Years; and as to the Opinion in the Caſe of *Iſham* and *Morris* to the contrary, that was but a ſudden (* Opinion) and (only) on Evidence; and it would be very inconvenient if a Fine ſhould bar Terms for Years (ſettled) in Truſt to attend the Inheritance; for in all Purchaſes, precedent Mortgages and Incumbrances are kept on Foot for ſecuring the Eſtate; and if thoſe ſhould be barred by Fines

Cro. Car. 303, 314.
Cro. Jac. 659.
Vide Ante, 215.
5 Com. Dig. 478.
Pow. Con. 40.
1 Burr. 60, 79, 111.
5 Burr. 2830.
Cow. 693, 702.

Leſſee for 100 Years not being in actual Poſſeſſion aſſigns his Term, it is ill.

* P. 271

Hard. 400, 401. Fines levied by the Owners of the Inheritance, it would deſtroy their own Titles; and *Founds* and *Saliſbury's* Caſe in the Exchequer, 16 *Car.* 2. was held contrary to *Iſham* and *Morris's* Caſe, on a Special Verdict. Alſo Leaſes in Truſt are not barred by Fines, for they attend the Eſtates paſſed by the Fines, and therefore no need to bar them: *Bridgman* Chief Juſtice of the Common Pleas, was of Opinion, That the Leaſe in the Caſe at Bar for 100 Years, was no Bar; but he was removed into Chancery before the Judgment given. And as to the ſecond Point they argued, That the Leaſe for 100 Years not being barred, the Leſſee may aſſign it over without Entry into the Land, for the Poſſeſſion of *Ceſtuy que Truſt*, and all claiming under him, is the Poſſeſſion of the Leſſee for 100 Years. *Latch.* 75. *Fiſher's* Caſe, Tenant for Years, lets at Will, Tenant at Will lets for Years, the Reverſion of the firſt Leſſee for Years is not diſplaced, but is aſſignable over. See alſo 2 *Cro. Powſly* againſt *Blackman*. But on the other Side it was argued, That Leaſes for Years are as well barred by Fines as Freeholds. 5 *Co. Saffin's* Caſe; and *Cro. Car. Iſham* againſt *Morris*, is a Caſe in Point; and they alſo cited *Founds* and *Saliſbury's* Caſe; as for them; See that Caſe now in Print in Serjeant *Hardres's Reports, fo.* Hard. 400. 400. And the Miſchief would be great if Leaſes for Years ſhould not be barred by Fines, for if they ſhould not, they may ariſe as Incumbrances on the Lands many Years after Purchaſes or Marriage-Settlements. And as to the ſecond Point they ſaid, It is not material whether the Fine be a Bar or not; if it be a diveſting of the Eſtate it is not aſſignable without Entry, and the Leaſe for 100 Years is diveſted by the making of the Term for fifty-four Years, and the Fine. Tenant at Will ought to be at the Will of both the Parties, and when a Tenant at Will grants a Term, he thereby determines his Will, and paſſes a new Eſtate, which diveſts the Reverſion of the firſt Term; and there may be a diveſting of an Eſtate without a Diſſeiſin or Bar. *Hob.* 332. Alſo, there may be a Diſſeiſin or Diveſting at Election; But who ſhall have the Election? Not the Leſſee for 100 Years by the Marqueſs, but the Marqueſs (himſelf) ſhall have the Election, and here

he

he has done that by the levying * of the Fine for corroborating the new Term of fifty-four Years. And afterwards in *Eaſter* Term, 22 *Car.* 2. the Court delivered their Opinion, and they all, *viz. Kelynge*, *Twyſden*, and *Moreton*, held, That the Term for 100 Years, was diveſted by the making of the Leaſe for fifty-four Years; and that the Marqueſs ſhall have the Election, whether it ſhall be diveſted or not, and not the Leſſee, who is only a Truſtee for the Marqueſs, and that the Marqueſs had made his Election by levying of the Fine to corroborate the Term of fifty-four Years; and they all agreed, That the Leaſe for 100 Years was barred by the Fine, becauſe it was turned to a Right by the making of the Leaſe for fifty-four Years before the Fine: and it was ſaid by the Chief Juſtice, and not denied, that Incumbrances kept on Foot by Purchaſers ſhould not be barred by Fines: And alſo, that where a Mortgagor retains the Poſſeſſion and pays the Intereſt, yet the Fine by a Mortgagor ſo holding the Poſſeſſion, ſhall not bar the Mortgagee; and the Judgment in the Common Pleas was affirmed.

* P. 272

Stokes againſt *Stokes.*

DEBT on Obligation; The Defendant pleads a Releaſe, and it is entered, reciting, That whereas *J. S.* had arreſted the Defendant in the Name of the Plaintiff, without his Knowledge, he thereby releaſed to the Defendant all demands on his own Account; and it appeared, that this Obligation was taken by *J. S.* in the Plaintiff's Name, in Truſt for the Children of *J. S.* and that thereupon *J. S.* cauſed the Defendant to be arreſted in the Plaintiff's Name, and thereupon the Releaſe was given; and it was adjudged, That the Obligation was not releaſed thereby; for although it was taken in the Name of the Plaintiff, yet it was not on the Plaintiff's Account, but on Account of the Children of *J. S.* and thoſe Words, *on his own Account*, were put in to ſome Purpoſe, and to no other Purpoſe could it be, but to diſtinguiſh demands which he had in his own Right, from ſuch Things (or demands) which he had in Right or in Truſt for others.

Obligee in Truſt for others, releaſes to the Obligor all demands on his own Account, it does not releaſe the Obligation. S. C 2 Keb. 530, 613. 1 Vent. 35. Vide ante 100, 101. 1 Sid. 141. 2 Show. 90. 2 Lev. 210, 214. 3 Lev 273.

Wells

* P. 273 * *Wells*, Executor of *Wells* againſt *Wells*.

Releaſe of an equitable Intereſt, a good conſideration in an *Aſſumpſit*. S. C. 1 Keb. 531. 1 Vent. 40. Vide ante 71, 257. 2 Lev. 119. 1 Mod. 25.

ASSUMPSIT, whereas the Defendant and the Plaintiff's Teſtator had contracted to make a certain quantity of Bricks for *Potter*, at a certain Price; the Defendant in Conſideration the Plaintiff would relinquiſh his Intereſt in the Bargain, promiſed to pay him 10*l*. After Verdict for the Plaintiff it was moved in arreſt of Judgment, That there is no Conſideration, for the Intereſt of the Partnerſhip ſurvives to the Defendant, and the Plaintiff had no Intereſt to relinquiſh: But Judgment was given for the Plaintiff, for he might have an equitable Intereſt by the bringing in of Materials, on which the Defendant might be charged by a Bill in Equity.

Hodgſon againſt *Harris*.

Statute of Limitations doe not extend to debt upon an Award, or a copyhold fine. S. C. 1 Sid. 415. 2 Keb. 462, 497, 533. 2 Saund. 64, 60. Ld. Raym. 248. Com. Dig. 260. Cowp. 375.

DEBT on an Award; the Defendant pleads the Statute of Limitations: On which the Plaintiff demurs, becauſe by *Saunders* it is not a Debt upon a Contract or Lending within the Words of the Statute: To which it was anſwered by *Jones*, That the Submiſſion to the Award is a Contract to pay the Sum awarded; and cited 3 *Cro.* 600. *Bowyer* againſt *Garland*. The Court inclined to the Opinion, That it was not within the Statute: And *Twyſden* ſaid, That Debt for a Copyhold Fine had been adjudged not to be within the Statute; whereupon *Jones* offered to waive the Demurrer and go to Iſſue, which *Saunders* refuſed; and it was adjourned.

The

The Lady *Broughton* againſt *Holte.*

TRESPASS for taking his Cattle; the Defendant makes a ſpecial Juſtification; the Plaintiff replied and averred the Juſtification, and concluded *Et hoc paratus, &c. unde petit Judicium ſi ab actione præcludi debet:* The Defendant demurred ſpecially, becauſe it is not concluded *petit Judicium & dampna ſua ſibi adjudicari;* whereupon the Plaintiff by Rule of Court, upon payment of Coſts, had Liberty to amend.

Petit Judicium omitting damages, ill on a ſpecial demurrer. S. C. 2 Keb. 514. Raym. 182. *Vide ante.*

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* Term. Sanct. Mich.

* P. 274

ANNO

21 Car. II. in Banco Regis.

Pordage againſt *Cole.*

DEBT on an Obligation for 70*l.* The Defendant demands *Oyer* of it, which is entered thus; *Memorandum, That ſuch a Day it is agreed between the Plaintiff and Defendant, that the Defendant the firſt of* October *next, pay the Plaintiff* 70*l. for ſuch a Houſe; In Witneſs whereof we have hereto mutually ſet our Hands and Seals:* On which the Defendant demurred; and it was now

Agreement to pay 70*l.* for a Houſe, *for* does not make a condition precedent, but it is a mutual agreement. S. C. 1 Vent. 183.

1 Sid. 423. 1 Saund. 319. Raym. 183. Poll. 14. 2 Keb. 542. 2 Danv. 229. pl. 1. Vide Cro. Jac. 399, 521, 522. 1 Roll. Rep. 356. Godb. 276. 2 Roll. Rep. 63, 64. Mo. 135. 1 Roll. Abr. 518. c. 1. Cro. Eliz. 413. 1 Com. Dig. 574 3 Term. Rep. 627.

objected for the Defendant, that the Declaration was ill, it not having averred that the Plaintiff had conveyed the Houſe to the Defendant, and that *pro* (for) is a Condition precedent, 7 *Co. Ughtred's* Caſe; and if it be not a Condition precedent the Defendant has no Remedy for the Houſe; for though that both ſealed, yet it is not an Indenture of two Parts, nor like to the Caſe in 3 *Hoe* againſt *Taylor, it is agreed between the Parties Leſſee to repair, Leſſor to find great Timber; where it is a mutual Covenant.* To which it was anſwered, It ought to be intended that the Houſe was conveyed before, for it is not to pay 70*l.* for the Conveyance of the Houſe, but for the Houſe itſelf; and the Court held it a mutual Covenant: And if the Houſe was not conveyed before, as it may be intended it was, the Defendant may have an Action of Covenant for the Houſe, for it is to be intended, that the Plaintiff ſealed to the Defendant another Part, by theſe Words, *have mutually* * P. 275 *ſet their Hands and Seals*; and upon the firſt * Argument, they gave Judgment for the Plaintiff, on which the Defendant brought a Writ of Error, and the Judgment was affirmed in the Exchequer-Chamber.

Dowſe againſt *Swayne.*

Action for cauſing him to be arreſted for 500*l.* to hinder him of Bail, where only 200*l.* was due. S. C. 1 Sid. 424. Ryam. 176. 1 Mod. 4. 2 Keb. 546. 1 Salk. 14, 15.

CASE, and declares, That the Defendant having no Cauſe of Action beyond the Value of 40*l.* did falſly and maliciouſly bring an Action againſt him by Bill of Privilege in the Common Pleas, where no ſum is expreſſed in the Writ, and cauſed the Sheriff to arreſt him for 500*l.* and to hold him to ſuch Bail as he could not find, whereby he was forced to lie in Priſon ſuch a Time. The Defendant pleads, that he had Cauſe of Action to the Value of 200*l.* *abſque hoc*, That he informed the Sheriff that he had Cauſe of Action for 500*l.* and after Verdict for the Plaintiff, it was moved in arreſt of Judgment, that there was a juſt Cauſe of Action, as appears as well by the Declaration, as by the Plea, and the enlarging of the Sum is not any Crime; for a Man may not certainly know his proper Cauſe of Action, or what is due to him. (But) the Court to the contrary. It is laid, that he did falſly and

and maliciouſly charge him with a greater Sum than is due, to hinder him of Bail, and it is ſo found by the Jury, and thereby he was forced to lie in Priſon; wherefore the Action well lies; and gave Judgment for the Plaintiff.

Stribler againſt *Jones* and *Waters.*

CASE, and declares, That the Defendant falſly and maliciouſly deviſing to dampnify him, and to hinder him from going about his Affairs, ſued a *Latitat* againſt him out of the King's-Bench in Treſpaſs, with *ac etiam Aſſumpſit* for 500*l.* and cauſed him to be arreſted and impriſoned for ſuch a Time, whereas in Truth he had not any Cauſe of Action, *vel ſaltem non tantum cauſam actionis*. After Verdict for the Plaintiff, it was moved in arreſt of Judgment, That it is not poſitively ſaid, *That he had not Cauſe of Action*; but *none, or at leaſt not ſo great*; and it is not ſo great if it fails but of 1*s.* of ſo much. But the Court to the contrary, it is found to be done maliciouſly, wherefore Judgment was ruled for the Plaintiff. But for that * the *Teſte* and Return of the *Lat'* was not certainly ſhewn, the Court would adviſe upon this Execution.

Caſe for falſly procuring him to be arreſted for 500*l.* where the Plaintiff had no cauſe of Action, or at leaſt not ſo great a cauſe.

* P. 276

Seamone againſt *More.*

CASE for theſe Words, *Thou art an Inchanter, and inchantedeſt a Bullock, and madeſt him run mad about the Common.* After Verdict Judgment was ſtayed; for an Inchanter is no more than a Cheat, who deals in Charms to cheat, and is not a Witch; and to make a Bullock run mad about the Common may be by chaſing and chafing him.

Inchanter, and made ſt a Bullock run mad, &c. not actionable. S. C. 1 Sid. 424. 2 Keb. 548.

Drake againſt *Hill.*

He is fled and gone (of a Merchant) *and I ſhall loſe my Money.*
S. C. 1 Sid. 424.
Raym. 184.
2 Keb. 549.

CASE for ſaying of the Plaintiff, being a Merchant, *He is fled and gone, and I ſhall loſe my Money*; and at another Day, *He is a beggarly Fellow, not worth a Groat; nor able to pay his Debts.* After Verdict, and entire Damages, it was moved, that the laſt Words are not actionable, and the Damages being intire, no Judgment could be. *Beggarly Fellow* is not, nor is *not worth* a *Groat*, and cited *Moone* and *Monham*'s Caſe to be ſo adjudged; and *not able to pay his Debts*, is not; for a Man of a great Ability may have his Eſtate ſo out of his Hands that he cannot pay his Debts; but the Court were of Opinion, that the laſt Words were as actionable as the firſt; but on the Importunity of Serjeant *Maynard*, who moved it, the Judgment was ſtayed for a Fortnight.

* P. 277 * Earl of *Peterborough* againſt Sir *John Mordant.*

Scandalum Magnatum for ſaying *I met my Lord's Servant, who I know not, but my Lord ſent to take my Purſe.*
S. C. 1 Vent. 59.
1 Sid. 434.
2 Keb. 537, 589, 605.

SCANDALUM Magnatum, for that the Defendant ſaid to *J. S.* Servant of the Earl, *I met* J. D. (another Servant of the Earl) *whom I do not know, but my Lord ſent after me to take my Purſe.* Judgment by Default, and before a Writ of Inquiry executed, the Judgment was ſtayed on *Jones*'s Motion; for that it is not poſitively ſaid, *That my Lord ſent him to take my Purſe, but I do not know but he did.* Alſo it is not ſaid, that he ſent to rob him, but to take his Purſe, which might be by way of Treſpaſs: But now it was anſwered by *North*, That though the Words are not poſitive and affirmative, that the Earl ſent him, yet they are tantamount in the Underſtanding of the common People; and ſuch oblique Words have been adjudged actionable in the Caſe of a Commoner, and much more in the Caſe of a Peer. As, *I heard a Bird ſing, that you have committed Felony; or I dreamed ſo:* And although it is not here ſaid, *feloniouſly* to take the Purſe, which might be a good Exception in the Caſe of a common Perſon, yet

I heard a Bird ſing, or I dreamed J. S. *ſtole a Horſe.*

yet it is otherwiſe in the Caſe of a Peer. *Crompt. Juriſdiction of Courts*, 13 *Leon.* 336. And of that Opinion was the Court after ſeveral Motions, and gave Judgment for the Plaintiff.

Burnet againſt *Holden*, Executor of *Greenhill.*

A *SCIRE Facias* againſt the Defendant as Executor on a Judgment in *Aſſumpſit*, againſt the Teſtator: The Defendant demands *Oyer* of the Judgment, on which it appeared, that the Teſtator died after the Verdict had for the Plaintiff on *non Aſſumpſit*; and before the day in Bank (leaving the Defendant his Executor) and the Judgment on which the Plaintiff brought the *Scire Facias*, was entered the next Term, on the new Statute made at *Oxford*, and the Defendant pleads a debt due to him * by Obligation of the Teſtator for 100*l.* and a Judgment by the Teſtator to the Lord *Arlington*; and that he had not Aſſets beyond 40*l.* which he retained to ſatisfy himſelf, and the Lord *Arlington*; On which the Plaintiff demurs, and now the principal Queſtion was, if this Judgment to the Plaintiff ſhall ſo relate as to be to all intents as a Judgment had againſt the Teſtator in his Life? And the Caſe was argued at the Bar three ſeveral Times, *viz.* in *Mich.* 21 *Car.* 2. and in *Hillary* following, and afterwards in *Trin.* 23 *Car.* 2. when *Hale* was Chief Juſtice, by *Coleman*, and twice by *Saunders* for the Plaintiff, and by *Jones*, *Winnington*, and *Levinz* for the Defendant. And for the Plaintiff it was argued, that by the aid of the Statute, this Judgment is now made a Judgment againſt the Teſtator, although he was dead before; aud is unavoidable, and ſo is payable before debts on Obligations: Alſo, That the Judgment had by the Lord *Arlington*, whereon no *Scire Facias* is ſued, is not pleadable againſt this Judgment on which a *Scire Facias* is ſued. But for the Defendant it was argued, That the Intent of the Statute was ſolely to make the Judgment good, and not voidable by Error; for the Statute ſays, *For avoiding Suits and Delays, be it enacted, That the Death of the Defendant after Verdict, and before the Day in Bank, ſhall*

Judgment *in Aſſumpſit* had after the Defendant's death, and before the Day in Bank. 8. C. 1 Mod. 6. Raym. 210. Vide 6 Mod. 143. 1 Vent. 235. 1 Salk. 8.

If it ſhall ſo * P. 278 relate as to be good againſt all other Judgments, &c. and to be paid by the Executor before Obligations, by the new Statutes.

Stat. 8 & 9. W. 3. c. 11. 1 Salk. 8, 42, 315. 6 Mod. 142, 143. Q. Fareſt. 64, 65, &c. Raym. 16, 55. 1 Sid. 131.

ſhall not be aſſigned, ſo that it be entered within ſuch a Time afterward. Q. But it does not ſay, That the Judgment ſhall be good and effectual as if he had been living; for after the Death of the Teſtator, a Retainer to ſatisfy himſelf (his own Debt) before the Judgment, had been a good Adminiſtration; and now by the Judgment afterwards it ſhall be a Mal Adminiſtration, and a *Devaſtavit*, by ſatisfying a Debt on an Obligation, before a Debt on ſimple Contract, (with ſuch Judgment.) And alſo ſhall make a Judgment, which was good, without a *Scire Facias* ſued thereon, not pleadable, nor ſatisfiable by that *Scire Facias* entered on this Judgment on ſimple Contract, which at the Time of the Teſtator's Death was not payable 'till (after) both the Debts on the Judgment, and the Obligation, and (all) this by Relation, which is but a Fiction in Law And ſuppoſe he had deviſed his Lands, though the Deviſe was good at his Death, yet ſhould the Land be chargeable by this Judgment had after his Death. In *Mich.* 21 *Car.* 2. *Twyſden* and *Moreton* held againſt the Plaintiff, but *Kelynge* and *Rainsford* for the Plaintiff. But in *Trin.* 23. Judgment was given for the Plaintiff by *Hale* and *Moreton*, *Twyſden* continuing of the contrary Opinion, and *Rainsford* ſaying nothing.

* P. 279

* *Smith* againſt *Wheeler*.

A Settlement with a *Proviſo, That if he be minded to revoke, and declare his Mind by Writing under his hand and Seal, that he may revoke,* is perſonal and not forfeited by Treaſon. 1 Hales P. C. 248 1 Wils. 176. 5 Com. Dig. 382.

ERROR of a Judgment in Ejectment in the Common Pleas, where on a Special Verdict the Caſe was, *Anthony Mayne* poſſeſſed of a long Term, aſſigned it in Truſt for himſelf for Life, with a Power for him to make Leaſes; and after his Death in Truſt to raiſe ſeveral Sums of Money for ſeveral of his Kindred; the Reſidue of the Truſt for one of his Siſters; Provided, That if he left Iſſue for his Wife enſeint, that he might diſpoſe of it to his Iſſue: And another *Proviſo*, That if he ſhall be minded to diſpoſe it otherwiſe, and declare his Mind ſo by Writing under his Hand and Seal, that he might do ſo: He was attained of

5 Com. Dig. 655. 1 Bl. Rep. 459. S. C. 1 Vent. 128. 1 Mod. 16, 38. 2 Keb. 564, 608, 644, 763. 772.

Treaſon

Treaſon for the Murther of King *Charles* I. And if the Term was forfeited for the King? was the Queſtion. And adjudged in the Common Pleas, That it was not forfeited: And now it was argued by *Pemberton* for the Plaintiff in the Error, who was alſo Plaintiff in the Common Pleas, (and Judgment there given againſt him, being the King's Patentee) and *Coleman* for the Defendant. And afterwards in *Eaſter* Term it was argued by *Jones* for the Plaintiff, and by *Winnington* for the Defendant. And for the Plaintiff it was ſaid, That it was Fraud apparent, of which the Court might judge, for the Truſt was for himſelf, and he took the Profits, he had Power to make Leaſes, and he had Power to revoke; and it appears by the Verdict, That the Truſtees did not know of the Truſt or Eſtate, *Lane*'s *Rep.* 42. and *Twine*'s Caſe and *Pauncefoot*'s Caſe in 3 *Cro.* were cited. But on the other Side it was ſaid, That the Court could not judge of Fraud, and the Jury have not found any, 10 *Co.* Chancellor of *Oxford*'s Caſe, and the *Proviſo* to revoke is perſonal to himſelf, *If he be minded to revoke, and do revoke by Writing under his Hand and Seal*, Duke of *Norfolk's* Caſe cited in *Engleſield*'s Caſe. *Kelynge* when he was Chief Juſtice, and *Twyſden*, inclined that it was forfeited. But afterwards in *Eaſter* Term, 23 *Car.* 2. *Hale* being Chief Juſtice, the Caſe was argued by the whole Court *ſeriatim*, and it was adjudged, That the Term was not forfeited, and the Judgment in the * Common Pleas was affirmed; and they all held it a Caſe directly within the Duke of *Norfolk*'s Caſe, and not a Truſt forfeitable to the King, according to Sir *J. Duncomb*'s Caſe, in 2 *Cro.* 512.

* P. 280

Lee againſt *Edwards.*

ASSUMPSIT, in Conſideration That he would provide Medicines, and would employ his Endeavour, and would cure *J. S.* to pay him ſo much as he deſerved;

Quantum Meruit if he provided Medicines and cured, and averred he found Medicines; and another *Aſſumpſit* in Conſideration he had found Medicines and cured. Verdict and intire Damages, good. S. C. 1 Sid. 428 1 Vent. 27, 44 2 Keb. 559, *&c. ibid.* Vide *Mich.* 22. infra *Brown & London.* Vide Hard. 485. 1 Mod. 14, 285. Nelſon's Lutw. 519. 2 Cro. 44. Vide poſt, 298.

ſerved; and avers, That he found Medicines and employed his Endeavour, and that it was of the Value of 10*l.* And alſo in Conſideration that he had provided Medicines, and employed his Labour and Pains, and had cured *J. S.* After Verdict for the Plaintiff it was moved in Arreſt, *&c.* That it is not averred in the firſt *Aſſumpſit*, That he had cured; and it is Part of the Conſideration that he would cure *J. S.* and that the Damages being intire, the Plaintiff could not have Judgment, But by the Court, It is certain upon the whole Matter that *J. S.* is cured; for it ſhall be intended after Verdict, That it is the ſame Perſon, the ſame Malady, and the ſame Cure; and they gave Judgment for the Plaintiff, for it is but the ſame Cauſe of Action laid ſeveral Ways, as is uſual in *Aſſumpſit*.— See hereafter P. 298.

Sir *John Carn* againſt *Oſgood*.

He is a forſworn Juſtice of Peace, actionable though no *Colloquium*. 8. C. 1 Vent. 50. 1 Sid. 432. 1 Mod. 22. 2 Keb. 548, 579. Nelſon's Lutw. 409.

CASE, for ſaying of him being a Juſtice of Peace (but does not lay any *Colloquium* of his Office of Juſtice of Peace) *He is a forſworn Juſtice, and not fit to ſit upon a Bench.* After Verdict for the Plaintiff it was moved in Arreſt of Judgment, That there is not any *colloquium* of his Office of Juſtice. But by the Court, There needs not, for by the Words themſelves, it appears they were ſpoken of him in reſpect of his Office.

actionable. Tide Style 22, 210. 1 Mod. 23. & ante 52. Stra. 618, 696, 1169. 4 Bac. Abr. 504, 513. 514.

* P. 281 * *Jefferies* againſt *Dee*, Adminiſtrator of *Everard*.

An Executor pleads ſeveral Judgments, *&c.* the Plaintiff may reply 3. 2 Keb. 591.

ASSUMPSIT upon a Promiſe of the Teſtator for 1000*l.* The Defendant pleads a Recognizance in Chancery for 2000*l.* and ſeveral Judgments againſt him-

to all, or to as many of them as he pleaſes. Vid. 2 Saund. 48, 49. 1 Mod. Ante 132, 200, 201, 255, 256, 261.

ſelf,

ſelf, after the exhibiting of the Bill, and pleads Payment of them ſeverally, and pleads ſeveral Obligations to ſeveral Perſons, and payment of them after the exhibiting of the Bill; and that he had fully Adminiſtered, and that he has not, nor at any Time after the Bill had any Goods, except Goods to the Value of the ſeveral Sums paid on the ſaid ſeveral Judgments and Obligations, and except Goods to the Value of 5*l.* which are chargeable, *and not ſufficient to ſatisfy the Recognizance*; The Plaintiff replies *by Proteſtation*, That the Judgments were had by Fraud and Covin, *for Plea* he ſays, That the Defendant did not pay the Money on the ſaid Judgment to *A.* nor on the ſaid Judgment to *B. &c. and ſo of the reſt*; and in like manner he pleads *Non-payment* ſeverally of the ſaid ſeveral Sums on the ſaid ſeveral Obligations, but omitting ſome of them; and for this puts himſelf on his Country; and as to the Recognizance ſays, it was ſatisfied, but kept on Foot by Fraud and Covin: Whereupon the Defendant demurs; and now he excepted to the Replication. *Firſt*, For that it was double and manifold by putting all the Particulars in Iſſue, where the *Non-payment* of one would have made an End of all: But it was not allowed, for the Plaintiff has Election to Traverſe one Thing only, or every one, for he may be miſtaken in one; and therefore it is good to traverſe as many of the Matters as he pleaſes; and ſo it was done in *Treſham*'s Caſe, and in *Turner*'s Caſe in *Coke*'s *Reports*, and all the Precedents are ſo. *Secondly*, It was held, That the Pleading *non ſolvit* to one (Thing) and not to another, *&c.* and then concluding *Et de hoc ponit ſe, &c.* was good, for there are ſeveral Iſſues included under the *Et de hoc ponit ſe, &c.* and that it is not a multifarious Iſſue as was objected. *Thirdly*, That the Omiſſion of pleading to any of the Sums paid on the Obligations ſhall not hurt, for he may plead to as many of them as he pleaſes, and omit the others. *Fourthly*, Although he miſtake ſome of the Sums, to which he pleaded *Non ſolvit*, it ſhall not hurt; for it is no more than if he had ſaid nothing to them: And Judgment was given for the Plaintiff, I myſelf being of Counſel with the Defendant.

Plea of *Non ſolvit* ſeverally to ſeveral Things, and puts himſelf on his Country, good. 9 Co. 108, 109. 8 Co. 132, 133. 2 Saund. 50. Vaugh. 104. Miſtake of any Sums where not bound to Anſwer to all, does not make the Plea faulty.

Term.

Term. Sanct. Hill.

ANNO

21 & 22 Car. II. in Banco Regis.

Wilbraham againſt *Snow.*

A Sheriff ſhall have Trover for Goods levied in Execution taken from him.
S. C. 1 Sid. 438.
1 Vent. 52.
1 Mod. 12, 30.
2 Saund. 47, 345.
2 Keb. 588.
1 Danv. 20, 4 & 5.
1 Bulſt 68.
2 Bulſt. 135.
2 Mod. 245.
6 Mod. 21, 291.
2 Bac. Abr. 370.
5 Bac. Abr. 267.

TROVER, and on *Not guilty* a Spectal Verdict, *viz.* The Sheriff took Goods by a *Fi. Fa.* a Stranger takes them from him; And whether Trover lies for the Sheriff was the Queſtion? It was argued by *Sympſon* for the Plaintiff, and *Winnington* for the Defendant: And for the Plaintiff it was compared to the Caſe of a Carrier, 1 *Roll. Abr.* 5. for whom it lies by Reaſon of the Special Property which he has, ſeeing he is reſponſible for them: To which it was anſwered, It is not like that Caſe, for the abſolute Property remains in the Owner after the Seizure; as *Dyer* 98, 99. *Yelv.* 44. and that the Sheriff might have Treſpaſs, but not this Action. But the whole Court to the contrary, The Sheriff has a ſpecial Property ſufficient to maintain this Action; and they gave Judgment for the Plaintiff. And by *Kelynge* Chief Juſtice, The Property is altered from the Owner and given to the Party, at whoſe Suit. *Quære* of this.

Cowp. 406. 2 Hawk. 67, 418. 1 Term. Rep. 730,

Jones

Jones againſt *Treſilian.*

BATTERY, The Defendant pleads *ſon aſſault demeſne*: The Plaintiff replies, That he was ſtanding in his Gate, and that the Defendant being on his Horſe, offered to ride over him, whereupon * he *molliter* aſſaulted the Plaintiff in Defence of his Perſon, which is the ſame Aſſault in the Bar. The Defendant demurs, and the Replication was adjudged ill, for thereby he has now confeſſed he firſt aſſaulted; but he ought to have ſaid, *molliter manus impoſuit* on the Plaintiff, to hinder him from riding over him: And Judgment was given for the Defendant.

In Battery, Plaintiff replies, he ſoftly aſſaulted * P. 283 the Defendant in Defence of his own Perſon. S. C. 1 Sid. 441. 1 Mod. 36. 2 Keb. 397. Vide 2 Roll. Abr. 548. 549.

Nelſon's Lutw. 470, 481. See 6 Mod. 149, 172. 1 Mod. 3.

Leech againſt *Midgly.*

TRESPASS for chaſing 40 of the Plaintiff's Sheep, ſo that by that chaſing they were much damnified, and one of them died. The Defendant juſtified for Damage feaſant in his Freehold. The Plaintiff replies, and claims Common in the Place where, &c. The Defendant rejoins, and juſtifies by incloſing, leaving ſufficient Common for all Beaſts levant and couchant on the Plaintiff's Tenement. The Defendant demurs, and now by *Weſton* and *Levinz*, (it was argued) the Bar was ill, in not anſwering to the Death of one of the Sheep, and he ought to have traverſed the driving, on which he died, and cited 3 *Cro.* 384. *Hill* againſt *Prideaux*. *Jones* to the contrary argued, That it need not, it coming only under the *ita quod*, which is but for Aggravation of Damages. And *Kelynge* Chief Juſtice held the Bar good, for the Reaſon given by *Jones*; and yet in that Caſe in 3 *Cro.* it came under the *ita quod*, as here. The other three held it was cured, at leaſt by the Replication over; and Judgment was given for the Defendant.

In Treſpaſs, that which comes under the *ita quod* for Aggravation of Damages, need not be traverſed. Q. B. C. 1 Vent. 54. Raym. 185. 2 Keb. 590, 601.

Jefferſon

Jeffeſon againſt *Dawſon.*

Iſſue for part, and demurrer in Chancery for other part, and both ſent hither. Judgment here on both.
8. C. 1 Sid. 436.
1 Mod. 29.
2 Saund. 13, 27.
* P. 284
2 Keb. 387, 621.
1 Danv. 776.

A *Scire Facias* in the Petty-Bag in Chancery, and there as to Part Iſſue was joined, and a Demurrer joined as to the other Part, and the Record ſent hither to try the Iſſue, which being done, and a Verdict given, they alſo argued the Demurrer here, and gave Judgment on both. To which it was objected, That the Iſſue was ſent hither, becauſe the Chancery could not try it; but that the Judgment ought to be given, and the Demurrer argued there. But upon Argument it was reſolved, That the Judgment was well given upon both * here; although that the Chancery might have given Judgment upon the Demurrer, before it came hither.

The King againſt *Newman* in Chancery.

Deviſe of lands to a College, notwithſtanding the Statute of *Mortmain.*
Vide 4 Co. Adams v. Lambert.
Moore Char. Uſes 79, 82, 83.
Moore's Rep. 640, 888, 822, 890.
Hob. 136.

INFORMATION, that *Stephen Newman* ſeized of Lands, deviſed them to *Trinity College* in *Cambridge*, for the maintenance of a Scholar there; and in the Will was this Clauſe, *That if any by Cavil ſhall hinder this Deviſe, or that the ſame cannot go to the College by Reaſon of the Statute of* Mortmain, *then I deviſe them to* Robert Newman, *and his Heirs.* And under this Pretence, That by the Statute of *Mortmain* the College cannot have them, *Robert Newman* entered, and kept the Poſſeſſion of the Lands, for which the Attorney-General brought this Information to have the Land eſtabliſhed to the College: And this whole Matter appearing on the Bill and Anſwer, and it being a Charity, it was held by the Lord Keeper *Bridgman*, that it ought to be eſtabliſhed to the College, by Virtue of the Stat 43 *Eliz.* notwithſtanding the Statute of *Mortmain*, and notwithſtanding the Clauſe in the Will; and ſo it was decreed. And the Lord Keeper ſaid, That it did not differ from *Lloyd's* Caſe, in *Hob.* 136.

Term-

Termino Paſchæ,

ANNO

22 Car. II. in Banco Regis.

Copping againſt *Harriard.*

DEBT on Obligation, conditioned to perform an Award, ſo that it be made at or before the Feaſt of St. *Michael*; and if they made none, then to perform the Umpirage of *J. S.* ſo that it be made at or before theſame Feaſt of St. *Michael.* The Defendant pleads, That the Arbitration made no Award, and that the Umpire made no Umpirage. The Plaintiff replies, That the Arbitrators made no Award, but that the Umpire made an Umpirage; and ſets it forth, and aſſigns a Breach. The Defendant demurs; and now for the Plaintiff it was argued, That the Submiſſion to the Umpire, although he had the ſame Day (as the Arbitrators) was not void, and cited *Dyer* 347. *Rol. Abr.* 261. And Juſtice *Moreton* doubted: But by *Kelynge*, *Twyſden*, and *Rainsford*, the Submiſſion to the Umpire was void; but if the Submiſſion had been to Arbitrators, and if they had made none, then to ſuch an Umpire as they ſhould name, it might have been good; for by their Election of an Umpire, they had waved the Submiſſion to themſelves. But as this Caſe is, if the Arbitrators had made one Award, and the Umpire another,

Arbitrators and Umpire, both named by the Parties, have the ſame Day; the Umpire cannot make any Award. S. C. 1 Sid. 428. 2 Saund. 129, to 133. Raym. 187. 1 Mod. 15, 274. 2 Keb. 562. 2 Vent, 116. Vide ante 174. Poſt, 302. Vide Traverſe & Twiſleton's Caſe, ante 174. Trin. 17. & Donavers & Maſcall's Caſe, infra Mich. 22. 1 Mod. 275. Poſt, 302. Vide Nelſ. Lutw. 167.

2 Saund. 129, 133. 1 Salk. 70, 72. 2 Mod. 169. 1 Com. Dig. 391. Ld. Ray. 222. Kyd. on Awards 51. 3d Term. Rep. 592.

other, which of them ſhould have been performed? And *Twyſden* cited a Caſe between *Bernard* and *King*, where the Umpirage in ſuch a Caſe was adjudged void. But the reaſon thereof was, as he ſaid, becauſe it was not pleaded, That the Arbitrators had refuſed to make any Award, ſo as here. And Judgment was given for the Defendant.

* P. 286

* *Horſly* againſt *Potten.*

A Horſe hired to ride from *Norfolk* into *Suffolk*, action not ſhewn where the hard riding was.
S. C. Raym. 187.
1 Sid. 457.
2 Keb. 620, 647.

CASE, That where the Plaintiff let to the Defendant a Horſe to ride from *Swaffam* in *Norfolk*, to *Ipſwich* in *Suffolk*, the Defendant did in that Journey ſo immoderately labour (or ride) the ſaid Horſe, that he died: After a Verdict for the Plaintiff, it was moved in arreſt of Judgment, by *Holt*, That no place is laid where the immoderate Labour was, and the Journey is in two Counties, and the Cauſe of the Action is the immoderate Labour; and the Judgment was ſtayed for the preſent; but it was afterwards given for the Plaintiff, as *Holt* told me. See 2 *Rol. Abr.* 675. *Litt. C. Num.* 2. That in ſuch a Caſe all ſhall be tried where the Action is laid.

Noell againſt *Nelſon.*

On *plene Adminiſtravit* pleaded, judgment prayed preſently.
S. C. 1 Sid. 448.
1 Vent. 94.
2 Saund 226.
2 Keb. 606, 621, 631, 666, 671.
1 Danv. 461.
2 Lev. 22.
3 Lev. 29.

DEBT on an Obligation, againſt an Adminiſtrator, who pleads *plene Adminiſtravit*, on which the Plaintiff prays Judgment according to *Shipley*'s Caſe in 8 *Co.* and after brought a *Scire Facias* for Aſſets, which happened afterwards, and had Judgment in the Common Pleas, on which Error was brought here and aſſigned in the firſt Judgment, *viz.* That it ought not to have been given on the Plea of *plene Adminiſtravit*, and for that *Dorcheſter* and *Webb*'s Caſe in 1 *Cro. Hutton* 128. and *Raſt. Ent.* 223, & 329. were cited. But on the contrary were cited *Shipley*'s Caſe, and *Trin.* 13 *Jac.* 1. *Rot.* 1164. and *Mich.* 13 *Jac.* 1. *Rot.* 206. Both which Caſes were adjudged in this Court. And *Kelynge*, *Rainsford*,

ford, and *Moreton* held, That the Judgment ought to be affirmed according to *Shipley*'s Caſe. *Twyſden* doubted, and took an Exception, for that the Defendant is put *in Miſericordia*, though the Plaintiff was not delayed; for the Plea is a Confeſſion of the Action. But the others ſaid, it was not a direct Confeſſion, but *quaſi* an Admittance of the debt; beſides, it is after Imparlance. And they affirmed the Judgment.

1 Rol. Abr. 217, 218. 1 Rol. Rep. 411. 3 Bulſt. 230, 231. Cro. Eliz. 257. Cro. Car. 453.

* *Webber* againſt *Tyrrell*.

* P. 287

AN *Indebitatus Aſſumpſit* for 1000*l.* in Money had and received, and alſo on an *infimul computaſſet*, on which account 1000*l.* was due: The Defendant pleads the Statute of Limitations; the Plaintiff replies that he is a Merchant, and ſets forth the *Proviſo* for Merchants Accounts. But by *Twyſden*, *Rainsford*, and *Moreton*, (in *Kelynge*'s abſence) ſtated Accounts between Merchants are not within the *Proviſo*, but only Accounts current; and *Jones* at the Bar ſaid, So was the conſtant Practice; but it was adjourned.

The Statute of Limitations does not extend to accounts ſtated between Merchants, but to current accounts. S. C. 2 Saund. 124. 1 Vent. 90. 2 Keb. 622, 634.

Vide 1 Mod. 71. 268. 2 Mod. 311. Poſt, 298.

Wilſon againſt *Armorer*.

DEBT on an Obligation againſt the Defendant as Heir, and on *riens per Diſcent* and a Special Verdict the Caſe was, *William Armorer*, the Father of the Defendant, being ſeiſed, made a Feoffment of the Lands in Queſtion, by the Name of the Manor of *Preſton*, and all Lands thereto appertaining, *except and reſerving* Black *and* White Acre, to himſelf for his Life only, *Habend'* (except before excepted) to the Uſe of the Defendant on his Marriage, and the Heirs Male of his Body, with Remainder to his right Heirs: And whether *Black* and *White Acres* were Aſſets by Diſcent to the

Feoffment of a Manor excepting and reſerving *Black-Acre* to himſelf for Life only. *Habend'* (except before excepted) to the Uſe of *A.* in Tail: *Black-Acre* does not paſs at all. S. C. 1 Vent. 78. 87. 106. Raym. 207. 2 Keb. 642.

643, 667, 719. Borr. 2159. Daug. 478.

the Defendant being the Heir, was the Queſtion. And it was twice argued at the Bar in two ſeveral Terms, and two Queſtions were made: *Firſt*, If by the Exception the two Acres are totally excepted out of the Conveyance? (for a Man cannot reſerve an Eſtate to himſelf for Life upon a Feoffment) or if the Exception be totally void? *Secondly*, If the Acres paſs by the Feoffment, yet the Limitation of the Uſe does not come till after the *Habend'*, and the *Habend'* is of the Premiſes except before excepted; and then no Uſe is limited of thoſe Acres, and then the Uſe of them reſults and deſcends to the Defendant the Heir, and ſo they are Aſſets in his Hands. * And on the ſecond Argument *Kelynge*, *Moreton*, and *Rainsford* inclined, That the Exception was not void, but that the Words, *To himſelf for Life*, were void, and that the Exception generally excepted the two Acres out of the Conveyance: And as to the ſecond they held, That if the two Acres paſſed by the Conveyance, yet no Uſe was declared of them. But *Twyſden* on the contrary held, That the Exception was totally void: But *ſecondly*, That no Uſe was declared of thoſe two Acres, and ſo that they deſcended. But it was adjourned, and afterwards, *viz.* after *Kelynge's* death, and before *Hale* was Chief Juſtice, *Twyſden* delivered the Opinion of the Court, and ſaid, That they were not all agreed, That the Exception excepted the two Acres totally out of the Conveyance; but they all agreed, That there was no Limitation of the Uſe of thoſe two Acres, ſo that they reſulted and deſcended: And they gave Judgment for the Plaintiff. *Levinz* for the Plaintiff, and Serjeant *Turner* for the Defendant.

* P. 288

The King againſt *Smith* and others Commiſſioners of Sewers.

A *Certiorari* lies to Commiſſioners of Sewers, and they are fineable for proceeding afterwards.
S. C. 1 Vent. 66, 67. Raym. 186. Mod 44. 2 Keb. 635. Vide 1 Salk. 201.

THE Commiſſioners of Sewers made a Tax for the Reparation of *Wapping-Wall*; the Inquiſition on which the Rule was made was removed by *Certiorari* into *B. R.* The Commiſſioners made a new Rule, and fined the Inhabitants for not collecting it, on which iſſued another *Certiorari*, and afterwards a third; and then an Attachment againſt the Commiſſioners, whereon

on they being brought into Court, it was moved for them, That by the Statute 13 *Eliz. c.* 9. the Commiſſioners of Sewers are not obliged to obey *Certiorari*'s out of this Court, nor to remove their orders; and ſo no Contempt. But by all the Court, The Statute does not extend to Returns on *Certiorari's*, but excuſes them from certifying their Orders into Chancery, as by the Statute *H.* 8. they before were obliged, with Intent to have the Royal Aſſent; whereupon they were fined each of them 40*l.* and committed for the Contempt.

* *Bernard* againſt *Bernard.*

* P. 289

ERROR of a Judgment in *Hull*, in *Aſſumpſit* to deliver the Poſſeſſion of a Houſe in a certain Place called *Hull-Bridge*. *Firſt*, For that the Court is ſaid to be held by Letters Patents *ſecundum Conſuetudinem Curiæ*; and a Cuſtom cannot be ſince the Time of *H.* 1. and *Long* and *Nethercote*'s Caſe in 1 *Cro.* was cited for this; but it was not allowed, for it is not ſaid, that the Proceſs was awarded *Secundum Curiæ*, time out of mind, *&c.* and then *Secundum Conſuetud. Conſuetudinem Curiæ*, is no more than *Secundum Curſum Cur'*. *Secondly*, The Breach is alledged, that he did not deliver the Poſſeſſion *licet ſæpius requiſit'*, which is not ſufficient, for he ought to have ſhewn a ſpecial Requeſt, but this was not allowed; for it being to deliver it before a certain Day, he had taken upon himſelf to do it, and then he is bound to do it before the Day at his Peril without any Requeſt. *Thirdly*, It is not alledged, That *Hull-Bridge* was within the Juriſdiction of the Court, and it may be without, and then this inferior Court had no authority to enquire thereof, and it is the very Cauſe of the Action: To which it was anſwered, That it being after Verdict it ſhall be intended within, otherwiſe the Defendant might have demurred on the Evidence, and if it had not been within, the Court there would have directed the Jury againſt the Plaintiff; and the Defendant having admitted it then, ſhall not now aſſign it for Error, when he might have had a Prohibition, and (cited) *Couſin* and *Nieuſon*'s Caſe in this Court, *Paſch.* 16 *Car.* 2. *Rot.* 278. where in *Caſe*, for that he was Collector

Proceſs award ed *Secundum Conſuetudinem Curiæ*, is all one with *Secundum Curſum Curiæ*. S. C. 1 Vent. 72. 2 Keb. 626, 635, 646, 550, *&c.* Vide ante 50, 96, 105, 137, 153, 156, 208. 1 Vent. 28. 2 Danv. 301. Plow. 150. a. 1 Term. Rep. 316.

Promiſe to deliver before ſuch a Day, he is bound to do it without Requeſt. Vide 72. 1 Mod. Nelſon's Lutw. 66, 90, 114, 115, 117, 136.

Hull-Bridge, if to be intended within the Juriſdiction of *Hull*-Court.

of the Cuſtoms in the Port of *Exeter*, the Defendant cauſed him to be put out of his Office, and the Action was brought in the Court of *Exeter*, and Judgment for the Plaintiff; and thereon Error aſſigned, becauſe it did not appear that the Port of *Exeter* was within the Juriſdiction of the Court of *Exeter*; and yet the Judgment was affirmed after it had depended here two or three Years; and *Kelynge* and *Moreton* held, That *Hull-Bridge* ſhall after a Verdict be intended in *Hull*, and within the Juriſdiction of the Court of *Hull*: But *Twyſden* with his whole Force to the contrary. * That *Quidam Locus vocat'* Hull-Bridge, ſhall not be intended a Bridge in *Hull*, for then it ſhould be ſaid *The Bridge of Hull*, but it ſhall be intended the Name of another Place; and after the Caſe had been debated three or four Times in this Term and in *Trinity* Term following, and *Twyſden* continuing earneſt in his Opinion, and divers Caſes having been adjudged according to his Opinion formerly in the *Marſhalſea* and other inferior Courts, I perſuaded my Client for his Expedition to conſent to a Reverſal, and to bring a new Action; which was done accordingly.

Vide Corbel & Pierſon's Caſe, ante pag. 153, 154. *Hill.* 16 & 17 *Car.* 2. *B. R.*

* P. 290

Love againſt *Windham*.

Deviſe of a Term to one for Life, and if he dies without Iſſue, to another. S. C. 1 Vent. 79. 1 Sid. 450. 1 Mod. 50, 114. 2 Keb. 637. 2 Chan. Caſes, 14, 15. 2 Danv. 523, 526. Vide ante 25. 1 Sid. 37. 1 Roll. 611, 612. 2 Cro. 491, 591, 695. 1 Jo. 15, 16. 1 Cro. 577. 1 Co. 156. 10 Co. 87. 1 Mod. 114. 3 Lev. 22. 1 Chan. Rep. 229. Doug 264. 3 Term. Rep. 484.

A MAN poſſeſſed of a Term for Years deviſes it to his Wife for Life, Remainder to his firſt Son for Life, and if he died without Iſſue, to his ſecond Son: The firſt Son died without Iſſue, and if the Remainder to the ſecond Son was good? was the Queſtion on a ſpecial Verdict; for it was objected, That here it is not *to him and his Iſſue*; in which Caſe it was agreed, it ſhould go to him and his Executors, and the Remainder over be void: But here it is deviſed *to him for his Life, and if he die without Iſſue, the Remainder to the ſecond Brother*; ſo that hereby he had only an Eſtate for Life, with an Executory deviſe to the ſecond Son on the contingency, that he had no Iſſue when he died; and cited 2 *Rell. Abr.* 406. No. 8, 9. Deviſe of a Term to one ſo long as he has Iſſue, Remainder over, is good: But after

after divers Arguments it was adjudged, That the Remainder to the ſecond Son was void, and that a Deviſe to one and his Iſſue, with a Remainder over, is all one with a Deviſe to one for Life, and if he dies without Iſſue, to another; for a Remainder of a Term ſhall not depend on a poſſibility ſo remote as the dying without Iſſue.

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* Term. Sanct. Trin.

* P. 291

ANNO

22 Car. II. in Banco Regis.

Draper againſt *Blany.*

JUDGMENT in the King's Bench for a Debt, and a *Fieri Facias* to the Sheriff, who returns *nulla bona*; but on a *Teſtatum fuit*, that he had Lands in *Denbighſhire*, another *Scire Facias* iſſued to the Sheriff of *Denbigh*, who returns *quod breve Domini Regis non currit in* Wallia. And *Kelynge* Chief Juſtice, on the firſt Motion held, That the Writ lies; the others ſaid nothing, but ordered the Sheriff to make ſuch a Return as he would ſtand by, and the Sheriff ſtood to his Return: And afterwards in *Mich.* 22 *Car.* 2. it was argued by *Saunders*, That the Writ lies, and he cited *Hetl. Rep.* 20. 2 *Cro.* 484 *Carew*'s Caſe, 2 *Bulſt.* 156. *Bedo* againſt *Piper*; & *Ibid.* 54. *Hall* againſt *Rotheram.* And by *Williams* for

Scire Facias, if it lies from the King's Bench into *Wales.* S. C. Raym. 171, 206. 2 Mod. 10. 2 Saund. 193. Vaugh. 395, &c. 2 Keb. 649, 657, 724. 3 Keb. 170, 401. Vide 1 Mod. 37.

Vide ante, 256.

for the Defendant it was ſaid, That in *Newman*'s Caſe, *Hill.* 1657. ſuch a Return was adjudged good. And *Twyſden* doubting whether the Writ lay, it was adjourned.

The King againſt the Mayor, &c. of *Stratford upon Avon.*

A Town-Clerk *durante beneplacite*, is removable without cauſe. S. C. 1 Vent. 77, 82, 342. Raym. 188. 3 Keb. 641, 656.

A *MANDAMUS* was to reſtore him to the Place of Town-Clerk there. They return their Charter, whereby they are enabled to chuſe a Town-Clerk *durante beneplacito*, and that they had removed him; but do not return any Cauſe, nor Summons to anſwer. Wherefore it was moved by *Jones*, That the Return was ill. But by *Kelynge*, * *Twyſden* and *Rainsford*, the Return is good; for it is to no Purpoſe to ſummon him to anſwer, whom they may remove without a Crime.

* P. 292

1 Sid. 461. 2 Sid. 49, 72. Cowp. 502, 508. Doug. 157. 2 Term. Rep. 541, 560.

Morris and others againſt *Creach.*

Obligation barred by an Award. S. C. Keb. 623, 659. Q. 1 Mod. 36.

DEBT on an Obligation by three Executors: The Defendant pleads, That there were divers Controverſies between the Defendant and one of the Plaintiffs; whereupon they ſubmitted themſelves to the Award, which awarded, That the Defendant ſhould be quit of the Obligation. The Plaintiff demurs, and on Argument it was held by the Court, That an Obligation by itſelf is not ſubmittable, becauſe it is a Debt certain, otherwiſe it is as here, where it is ſubmitted among other Things: And *Kelynge* and *Twyſden* held the Plea good, notwithſtanding the Controverſies were only between one of the Plaintiffs and the Defendant; but *Moreton* doubted, not only for the ſaid Reaſon, but alſo for that an Arbitrament is not of ſo high a Nature as an Obligation, and therefore cannot be a Bar. But ſee 45 *Ed.* 3. 16. an Opinion, That an Award by Deed is pleadable in Bar of an Obligation. But 1 *Roll.* 270. is an Opinion to the contrary: And it was adjourned.

Controverſi is between one of the three Executors and the Defendant, they all ſubmit to an Award, that the Obligee ſhall be diſcharged, &c.

Hoſkins

Hoſkins againſt *Matthews* and *Clarke.*

CASE, for that the Defendant falſly and maliciouſly, without any reaſonable Cauſe, cited and excommunicated him in the Eccleſiaſtical Court. After Verdict, it was moved in arreſt of Judgment, That it does not appear for what Cauſe the Suit there was. But *per Cur'*, it is ſaid and found to be falſly, and without any Cauſe; and the Action lies, and Judgment was for the Plaintiff.

Caſe for excommunicating the Defendant without cauſe.
S. C. 1 Vent. 86.
1 Sid. 463.
2 Keb. 636, 663.
Poſt, 297.

* *Beany* againſt *Turner.*

* P. 293

ERROR of a Judgment in the Common Pleas, where the Plaintiff declares, That it was agreed between him and the Defendant, that the Plaintiff ſhould ſurrender to the Defendant certain Copyhold Lands, and that the Defendant ſhould pay to the Plaintiff ſo much; and in Conſideration, That the Plaintiff had aſſumed to perform the Agreement on his Part, the Defendant had aſſumed to perform the Agreement on his Part: And avers, That he had ſurrendered into the Hands of two Copyholders, according to the Cuſtom, to the Uſe of the Defendant, and that the Defendant had not paid: On which the Defendant demurs, and Judgment was given in the Common Pleas for the Plaintiff. And now the Error aſſigned was, That the Surrender into the Hands of two Copyholders, was not a good Performance on the Plaintiff's Part. And cited 1 *Cro. Sims* againſt *La. Smith.* Agreement to ſurrender generally, he is not obliged to make a Letter of Attorney to ſurrender. And *Hill.* 12 *Car.* 2. *B. R. Rot.* 1735. *Burges's* Caſe *Styl.* 107. and 1 *Cro. Devered* againſt *Ratcliffe.* (Q) To which it was anſwered, That on an Agreement to ſurrender generally, a Surrender by any Way is ſufficient. But *Twyſden* held, That this Surrender was no Performance. And *Kelynge* Chief Juſtice, held the contrary. But by the whole Court, here being mutual Promiſes, there needs no Averment at all of

Agreement to ſurrender a copyhold, if a ſurrender into the hands of two copyholders be ſufficient.
S. C. 1 Mod. 61.
2 Keb. 666.

Q. Cro. Eliz. 239.
1 Wood. Con. 14 Gil. Ten. 277.
1 Bac. Abr. 471, 472.
1 Term. Rep. 600.
On mutual promiſes there needs no averment of performance, and an ill averment ſhall not hurt.
Ante 3, 20, 70, 87.
1 Keb. 333.

of the Performance, and therefore an ill Averment of that which needs no Averment, ſhall not hurt; and thereupon they all affirmed the Judgment.

Simpſon againſt *Quiney*.

Cuſtom, that lands ſhall deſcend to the elder daughter for life only.
S. C. 1 Vent. 88.
2 Keb. 672, 679, 2 Danv. 550. pl. 3. Vide ante, 172, 1 Rol. Abr. 502. pl. 1. 1 Keb. 925. 2 Keb. 111. 1 Sid. 167.

THE Cuſtom of *Newcaſtle upon Tyne*, That the Land ſhall deſcend to the elder Daughter only for her Life, was adjudged good, without Argument: For the Court ſaid, That they had adjudged it ſo before; which you may ſee in the Caſe of *Newton* and *Shafto*. *Ante* 172.

* P. 294

* *Grell* and Others againſt *Richards*.

8 Defendants appear by Attorney, where two are Infants, Judgment reverſed againſt all.
Poſt, 299, 300, &c. ib. Stra. 783.

ERROR of a Judgment in the Common Pleas, in Treſpaſs againſt eight Defendants, on which they brought Error, and ſay in the Writ, That the Judgment was *ad dampnum ipſorum*. The Defendant appears on the *Scire Facias*, and pleads, *in nullo eſt Erratum*, where the Error aſſigned, was Nonage of two of the Defendants; and yet that all appeared by Attorney. And afterwards in *Mich.* 23 *Car.* 2. *Hale* being then Chief Juſtice, the Judgment was reverſed *in toto*. Becauſe 1*ſt*. The Pleading of *in nullo*, &c. is a Confeſſion of this Error in Fact, it being a Demurrer, and no way is left by the Demurrer to try it; they ought to have pleaded to the Infancy, ſo that Iſſue might be taken thereon. 2*dly*. Although it is ſaid, *ad dampnum ipſorum*, it is good; for it was to the Damage of all to have Judgment given againſt them; although by *Hale* they might have ſaid, To the Damage of the two Infants.

Error in Fact aſſigned, *in nullo erratum eſt* is a demurrer, and confeſſion of the Fact.

Langan

Langan againſt *Carne.*

EJECTMENT, and on Not guilty and Special Verdict, the Caſe was: A Man demiſes Lands for forty Years rendering Rent; and then makes another Leaſe for Ninety-nine Years, to commence after the ſaid Term of 40 Years, rendering Rent from the Time that the ſecond Term commences, *and not before*; and then in another *Reddendum* reſerves Capons. And then it follows, *And alſo yielding and paying at the Death of every Tenant* 3l. *in the Name of a Heriot.* The Tenant of the ſecond Leaſe dies during the continuance of the firſt Leaſe, and if the Heriot be due, was the Queſtion. And *Kelynge* Chief Juſtice, held it due by the expreſs * Words, though he could not have any Benefit of the Land during the firſt Term. But *Twyſden*, *Rainsford*, and *Moreton* to the contrary, That the Intent could not be to have him pay who could not have any Profit of the Land; and this appears by the Words. *And alſo, &c.* which ſhews, That the Heriot ſhall not be payable but when the Rent ſhall be payable; and ſo it was adjudged by thoſe three.

Leaſe for 40 Years, then a Leaſe for 99 Years from the end of the firſt Term, rendering a Heriot on the death of each Tenant. No Heriot payable till the firſt Term ended.
S. C. 1 Sid. 437.

* P. 295

1 Saund. 165, 166, 167. 1 Vent. 91. 2 Keb. 588, 505, 572, 677. No Heriot payable till the firſt Term ended.
Bract. Lib. 2. fo. 86. 2 Roll.

Abr. 72. & 451. 1 Roll. Abr. 669. p. 19. 8 H. 7. 10. 4 E. 3. 22. 24 E. 3. 72. 38 E. 3. 7. 7 E. 4. 18, 19. L. 5 to E 4. 72. Plowd. 96. Keilw. 14. 82, 84, 167. 8 Co. 104, 106, 144. 10 Co. 56. 6 Co. 1, 2, 37. b. Co. Litt. 145, 149, 185. 2 Brownl. 293 to 296. Goldſ. 97, 191. March 23, 46. Mo. 16, 540. 2 Roll. Rep. 407, 451. Dyer 199. Palm. 342. Old Benl. 18. N. Pend. 30. Dr. & Stud. 9, 76. Hob. 60, 176. Hetl. 57. Shep. Abr. 2 Part, 285, 286. Hutt. 4. Owen 152. Winch 46, 47, 57. Litt. Rep. 35. 1 And. 298, 299. 2 Leon. 8. 1 Bulſt. 102. 2 Bulſt. 196. 1 Cro. 260, 5, 313, 314. 2 Cro. 76. Cro. El. 32, 589, 590. 1 Jo. 300. 1 Sid. 437. 1 Vent. 91. 2 Saund. 146 to 168. 2 Keb. 505, 572, 588, 677. 2 Lev. 210. 1 Show. 81. 1 Mod. 216, 217. 3 Mod. 230, 231, 4 Mod. 321. 6 Mod. 64. 1 Salk. 356. Nelſon's Lutw. 203, 416, 425, 433 to 436.

Term.

Term Sanct. Mich.

A N N O

22 Car. II. in Banco Regis.

The King againſt *Wilde.*

The Court *Ex officio* ought to take Notice of the beginning and end of Prorogations and Seſſions of Parliament. S. C. 2 Keb. 686. Raym. 191.

INFORMATION on the Statute 13 *Car.* 2. againſt the *Norwich* Weavers, for having more than two Apprentices; and after a Verdict on Not guilty for the Plaintiff, it was moved in arreſt of Judgment, That the Commencement of the Parliament was miſtaken: To which it was anſwered, That it being a private Act, the Court could not take Notice thereof by any Matter *dehors*, but if they would have Advantage thereof, they ought to have pleaded *Nul tiel Record.* But *per Cur'* The Court is obliged to take Notice of the Commencement of Parliaments, and alſo of Prorogations and Seſſions, and they ought to take Notice, that there cannot be any ſuch Act. See *Heil.* 119. *Jenkins's* Caſe, and *Dyer* 203.

Yarde againſt *Forde.*

Caſe for erecting a Market to the Damage of the Plaintiff's Market. S. C. 2 Saund. 172. Raym. 195. 1 Mod. 69. 1 Vent. 98. 2 Keb. 689, 706.

CASE, for that he being ſeiſed of a Market, the Defendant without any lawful Warrant erected another Market within ſeven Miles, to the Damage of his Market: After a Verdict for the Plaintiff on Not guilty, it was moved in arreſt of Judgment. *Firſt*, That

That it it not ſhewn that it is another Market which is held on the ſame Day, and then no Action lies, 2 *Roll.* 140. 22 *H.* 6. 14. 11 *H.* 4. 5. *b. Regiſt.* 107. *a. b.* Alſo *ſecondly*, That this is ſeven Miles diſtant, and there never was an Action maintained if it was not within five Miles. But *per Cur'*, It being laid and found to * be without any lawful warrant, and to the Damage of the Plaintiff's Market, Judgment was given for the Plaintiff. * P. 297

Powell againſt *Jones.*

ERROR of a Judgment in the Common Pleas for Words, where the Plaintiff declared, That he being an Attorney, the Defendant having a *Colloquium* of him and his Profeſſion, ſaid, *That he could not read a Declaration*, whereby he loſt one *Scott* his Client; and on a Verdict the Plaintiff had Judgment there: And now the Error aſſigned was, that it is not averred, That he could read a Declaration; and *Twyſden* at firſt held, That the Action did not lie for want of the Averment: But afterwards, it being laid to be *falſo*, and ſo found, the Judgment was affirmed.

He cannot read a Declaration, ſpoken of an Attorney, without averment that he could.
S. C. Ray. 196.
1 Vent. 98. contr.
2 Keb. 710.
Vide 1 Mod. 272. contra.
For *falſo* ſupplies that and the *Colloquium*. Ante, 292.

Catterel againſt *Marſhall.*

ERROR of a Judgment in *Aſſumpſit* in the Common Pleas, where the Plaintiff declared, That in Conſideration of 30*l.* paid by the Plaintiff to the Defendant, and that the Plaintiff had taken upon him to give the Defendant Bond with ſufficient ſureties to ſave him harmleſs from ſuch a Suit, the Defendant promiſed, *&c.* and ſays, That he gave him Bond with ſufficient Sureties to ſave him harmleſs from the ſaid Suit; and on a Verdict and Judgment for the Plaintiff there, it was now aſſigned for Error, That it is not ſhewn of what Penalty the Obligation was, nor what the Sureties were; and cited for this *Hob.* 69, 77. *Jervis*'s Caſe: But *per Cur'*, When the Obligation is to be given for the

Promiſe to give an Obligation with ſufficient Sureties, where he ought to ſhew the Penalty and the ſufficiency of the ſureties or not.
S. C. 1 Vent. 99.
1 Mod. 70.
2 Keb. 692.
Vide 1 Sid. 270.

the payment of Money, it ought to be ſhewn what the Penalty is, and of what Sufficiency the Sureties are, ſo that the Court may judge of the Sufficiency of the Penalty and the Sureties: But here it being to ſave (harmleſs) againſt uncertain Damages and Coſts of Suit, ſo that the Court cannot judge of the Sufficiency, he need not ſhew it in the Declaration, but it ought to come on the Evidence on (the Iſſue) *Non Aſſumpſit*, and the Court that tries the Cauſe ſhall judge of the Sufficiency of the Penalty and the Sureties; wherefore they affirmed the Judgment.

* P. 298

* *Brown* againſt *London.*

Aſſumpſit on the cuſtom of Merchants, &c. and a general *Indebitatus* joined, and intire Damages.
S. C. 1 Vent. 152.
1 Mod. 285.
2 Keb. 695, 713, 758, 822.
Hard. 485.
1 Danv. 27, 5.
Vide ante 280.
Hard. 485.
2 Show. —
Nelſon's Lutw. 510.
Vide Mich. 21. ante, inter *Lee* & *Edwards*.

ASSUMPSIT, and declares on the Cuſtom of Merchants and others trading in *England*, That if a Man draws a Bill on another, who accepts it, he is obliged to pay it; and that *J. S.* drew a Bill on the Defendant to pay to the Plaintiff, that he had accepted it and not paid it: And alſo, whereas the Defendantt was indebted to the Plaintiff on another Bill of Exchange, that he had promiſed and had not paid: After a general Verdict on both Promiſes, and intire Damages given, Judgment was ſtayed; for that no Cuſtom is laid to warrant the ſecond Promiſe, and without a Cuſtom the Action upon a Bill (of Exchange) is not maintainable; and the Cuſtom laid in the firſt Part does not extend to the ſecond Part (or Count.)

Martin againſt *Delboe.*

Statute of Limitations not pleadable on accounts ſtated between Merchants.

ASSUMPSIT for Money due on Account ſtated between Merchants; The Defendant pleads the Statute of Limitations: And on Agreement it was doubted,

Diſcontinuance after argument. S. C. 1 Sid. 465. 1 Mod. 70. 1 Vent. 89. 2 Keb. 674, 696, 717. 2 Saun. 125. Vide ante 287. Vide ante 1, 48, 191, 227. 2 Lev. 118, 124. 1 Mod. 13, 41. 1 Saund. 23. 2 Saund. 64. 1 Sid. 84, 306.

ed, whether it appeared ſufficiently on the Declaration that the Account was ſtated: And afterwards the Plaintiff prayed leave to diſcontinue, and had it, though it was after argument.

* The King againſt *Leſingham.*

* P. 299

INFORMATION, for that the Defendant being Lord of the Manor of *D.* took unreaſonable Diſtreſſes on divers Tenants of the Manor, and was a Diſturber of the Peace, and a common Oppreſſor: And after Verdict, Judgment was ſtayed; for the taking of unreaſonable Diſtreſſes is to be puniſhed by Action on the Statute of *Marlbridge, cap.* 4. Diſturber of the Peace, and common Oppreſſor are too general. 1 *Mod. Rep.* 451. *Cornwallis's* Caſe.

Common Diſturber of the Peace, &c. too general.
S. C. Raym. 193, 205.
1 Mod. 71, 288.
2 Keb. 687. 697.
1 Ven. 97, 104.
Vide 1 Keb. 635.
1 Sid. 282. Fareſt. 52. 6 Mod. 178, 289, 311. 1 Salk. 382.

Hamilton againſt *Vere.*

CASE, whereas the 1ſt of *May*, 1655, he had retained one *A.* to ſerve him for 9 Years as Apprentice, the Defendant ſeduced him from his Service ſuch a Day, whereby he loſt his ſervice for the Reſidue of the Term: And after a Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Term is not expired, and yet he had declared and recovered for the Loſs of Service for the whole Reſidue of the Term, and *A.* may yet return and ſerve him; but he ought to have declared of the Loſs of the Service from the Time of the Departure, until the exhibiting of the Bill: And of this Opinion were *Twyſden* and *Rainsford*; and in the Abſence of the other Judges they ſtayed the Judgment on the Argument of *Saunders* for the Defendant, and *Winnington* for the Plaintiff.

Caſe for Loſs of ſervice for the whole Term, though not yet expired.
S. C. 2 Saund. 169.
Raym. 200.
2 Keb. 693. 697.
Vide 6 Mod.
1 Mod. 271.

Foxwiſt

Foxwiſt againſt *Tremayne.*

An Infant and one of full age Executors, join and ſue by Attorney.
S. C. 1 Mod. 47, 72, 296.
1 Sid. 442.
1 Vent. 102.
* P. 300
2 Saund. 212.
Raym. 198.
2 Keb. 633.
Vide 2 Lev. 38, 399.
Ante 161, 181, 294.
1 Mod. 297.
2 Cro. 10, 640.
Cro Eliz. 387, 541.
Yelv. 130.
Ow. 156.
Moor. 266.
Brig. 73, 228.
2 Inſt. 390.

DEBT brought by three Executors by Attorney, one of them being within Age: The Defendant pleads, That he is within the Age of 17 Years: On which the Plaintiff demurs, and two Points were argued at the Bar. 1*ſt*, Where an Infant, and others Executors, of full Age, join in an Action, if the Infant ought to ſue by Guardian? 2*dly*, If the Infant ought to be omitted, and the Suit only * in the Name of thoſe of full Age? And now the Court, *viz. Twyſden*, *Rainsford*, and *Moreton*, (*Kelynge* being abſent and ſick) delivered their Opinions. And as to the 1*ſt*. it was held by *Rainsford* and *Moreton*, That an Infant and another Executor may ſue by Attorney; but if they are Defendants, the Infant ought to be by Guardian; as 2 *Cro. Weſtcot* againſt *Cotton*, 1 *Roll. Abr.* 288. *Sect.* 3. And as to the 2*d* they held, That all ought to be joined in the Action, and that there ſhall not be any Adminiſtration granted to another *durante minoritate*, where one of them is of Age. *Twyſden*, as to the 2*d* held, That they may join, and all the Plaintiffs; as *Yelv.* 130. *Smith* againſt *Smith*, and 5 *Co. Prince*'s Caſe: But as to the 1*ſt* he held, That that the Infant ought to be by *Prochein Amie*, where he is Plaintiff. as well as by Guardian, where he is Defendant; and in no Caſe by Attorney: For 1*ſt* he cannot make a Warrant of Attorney, for the Warrant made by him is void. 2*dly*. If there ſhould be a Nonſuit, the Infant would be *in Miſericordia*, which an Infant cannot be. But upon the Opinion of the other two Judgment was given, That the Defendant ſhould anſwer over.

Reeves againſt *Gibſon.*

No Bail in account till after Judgment, *quod computet.*
S. C. 1 Vent. 105.
2 Keb. 713.

IN Account the Plaintiff inſiſted upon Special Bail, becauſe the Defendant would go beyond Sea; but it was denied by the Court: For in Account no Special Bail is to be found until Judgment *quod computet*; and ſo it was ruled *Hill.* 14 & 15 *Car.* 2, in this Court, between *Lewis* and *Bayly*, and *Noy* 28.

Roberts

Roberts againſt *Marriott.*

DEBT on Obligation conditioned to perform an Award, ſo that it be made and tendered at the Houſe of *J. S.* ſuch a Day. The Defendant pleads an Award: The Plaintiff replies, and ſhews an Award, and aſſigns a Breach. The Defendant rejoins, That it was not tendered at the Day. The Plaintiff demurs; and for the Defendant it was argued, That this was no Departure; for it not being tendered, and * the ſubmiſſion being conditional, with an *ita quod* (that it be) it is no Award. To which it was anſwered, That the Plea of no Award is intended of no Award at all either in Fact or in Law: But the Rejoinder admits an Award in Fact, but that it is void in Law for want of tender, and ſo it is a Departure. 2 *Roll. Abr.* 692. *pl.* 10. And of this Opinion were the whole Court, *viz. Twyſden*, *Rainsford*, and *Moreton*, and gave Judgment for the Plaintiff.

Plea, no Award, and Rejoinder not tendered, is a Departure. S. C. 1 Mod. 42, 289. Raym. 94. 2 Keb. 614, 618. 702. * P. 301 2 Saund. 73, 188, 189. Ante, 133. 2 Saund. 53, 188. Vide 1 Cro. 164. 3 Cro. 755. Yelv. 38. Raym. 199. 1 Mod. 72. 2 Saund. 73, 189.

1 Vent. 101. 1 Saund. 102.

Weſt againſt *Davies.*

TROVER *de tribus ſtruibus fœni Anglice* Ricks of Hay: After Verdict it was moved, that *ſtruibus* is uncertain, and ought to be *de tantis Carectatis*. But the Court on the Contrary held it certain enough, and gave Judgment for the Plaintiff.

Trover of three Ricks of Hay, good, S. C. 2 Keb. 703. 1 Mod. 289. 1 Dany. 24, 26. Vide Cro. Jac. 2 Lev. 11, 176.

307. 1 Bulſt. 126. 2 Kab. 765. 1 Sid. 98. 1 Vent. 114. V. Poſt. 303. Stran. 1229. 2 Hale 262. 2 Hawk. 466.

Wooten

Wooten againſt *Hale.*

Covenant lies on a Warranty upon a Fine *ſur conceſſit*, by a Feme Covert, S. C. 1 Sid. 466. 2 Saund. 177, 181. 2 Keb. 684, &c. 1 Mod. 66, 101, 290. 2 Danv. 50. 14. Entry, having a lawful Title, not ſufficient without ſhewing what Title. Cro. Eliz. 437, 916. Cro. Jac. 315, 425, 444. Yelv. 30. Noy 50. Moor. 185. Vaugh. 118, 122. 2 Mod. 213. 2 Vent. 46. 3 Mod. 135.

COVENANT, and declares, That *John Hall*, and *Elizabeth* his Wife, levied a Fine *ſur conceſſit* with warranty of Lands to the Plaintiff, and the Huſband died, and that *J. S.* having a lawful Title, entered and expelled the Plaintiff by due Proceſs of Law. The Defendant by Proteſtation, that *J. S.* had no lawful Title for Plea, ſays, that he did not enter and expel the Plaintiff *modo & forma* as the Plaintiff had declared; and on this Iſſue Verdict was for the Plaintiff. And now it was moved in arreſt of Judgment, that the *having a lawful Title*, is not ſufficient: For it may be, that he had a lawful Title under the Plaintiff himſelf; as 2 *Cro.* 325. *Kirby* againſt *Hanſake*, and ſo held the Court, *viz. Twyſden*, *Rainsford*, and *Moreton*. 2. It was objected, that an Action of Covenant does not lie on this Warranty in the Fine *ſur conceſſit*, by the Feme Covert. But the Court on the contrary held, that Covenant lies on the Warranty in this Fine, as well as Voucher, or a *Warrantia Chartæ*, on a Fine by a Feme Covert, or a Fine levied of Lands in Fee. But for the firſt Exception Judgment was ſtayed.

Vid. 2 Saund. 177, 179. Ante, 83. 2 Lev. 37, 164, &c. ib. 3 Lev. 323. 3 Bac. Abr. 715. 5 Com. Dig. 44, 83. Term. Rep. C. B. 275. 1ſt Term. Rep. 671.

* P. 302

* *Donavan* againſt *Maſcall.*

Arbitrators and Umpire have the ſame Day. S. C. 1 Mod. 274. 1 Sid. 456. 2 Keb. 714. Raym. 205. Vide Cro. Car. 263. 1 Rol. Abr. 262, 265. 1 Mod. 274.

DEBT on Obligation, conditioned to perform an Award, ſo that it be made at or before the 19th of *February*, and if they did not make any, (then) to the Umpirage of ſuch a Perſon as the Adminiſtrators ſhould name, ſo that it were at or before the 20th of *February*. The Defendant pleads no Award, &c. The Plaintiff replies, that the Arbitrators did not make any Award; but that the 19th of *February* they elected ſuch a one Umpire, who made his Umpirage, and ſhewed what it was,

275. 2 Mod. 169. 1 Jo. 167. 2 Saund. 129, 133. Lutw. 541, 542. 1 Salk. 70, 72. 1 Com Dig. 501. Ld. Ray. 222. Kyd. on Awards, 51. 3d Term. Rep. 592.

was, and aſſigned, a Breach; on which the Defendant demurs, and now it was argued for the Defendant. That the Umpirage was void, it being made before the Power of the Arbitrators was determined. But on the contrary it was ſaid, that their Power was determined by the Election of the Umpire, the Umpire being elected by themſelves; otherwiſe where the Umpire is appointed by the Parties ſubmitting, and he makes his Umpirage before the time limited for the Arbitrators is expired. But now *Twyſden* and *Moreton* ſtrongly inclined, that the Umpirage was void, and the Arbitrators Power not abſolutely determined by the Election of an Umpire, they not having abſolutely refuſed to make any Award. *Rainsford* ſeemed of a contrary Opinion, and it was adjourned. See *Copping* and *Harriard's* Caſe, *Ante* 285. and *Traverſe* and *Twiſleton's* Caſe, *Ante* fol. 174.

* Archdeacon of *Rocheſter's* Caſe.

* P. 303

Privilege for excuſing an Archdeacon from being Expenditor of a Farm. S. C. 1 Vent. 105. 1 Mod. 282. 2 Keb. 693.

A WRIT of Privilege was prayed to excuſe him from the Office of Expenditor in the Level of *Romney Marſh* in *Kent: Firſt*, Becauſe he being an Eccleſiaſtical Perſon ought not to be put in ſuch an Office. *Secondly*, For that all the Land he has in the Level, is in Leaſe for Ninety-nine Years; and the Writ was granted by *Rainsford* and *Moreton*, they only being in Court; *Moreton* for the firſt Cauſe, and *Rainsford* for the ſecond.

Jenny againſt *Norris.*

Trover *de quadam parcella Fili.* S. C. 1 Vent. 105. 1 Mod. 295. 2 Keb. 715. Vide ante, 301. 1 Vent. 71, 105.

A *QUANTUM meruit* was in the Common Pleas, among other Things *De quadam parcella Fili*, and Verdict and Judgment for the Plaintiff there; and thereupon Error was brought here, and it was aſſigned, that a *Parcel of Thread* is altogether uncertain in a *Quantum meruit*: But by the Court, it is certain enough in this Action

1 Sid. 445. 1 Mod. 46, 294. Style 360, 358, 419. 2 Saund. 74. 6 Mod. 87.

Action or in Trover, where Damages only are to be recovered, and not the thing itſelf, as in Replevin and *Indebitatus Aſſumpſit*, or a *Quantum meruit pro diverſis Mercimoniis ſibi venditis & deliberatis* is as uncertain as *parcella Fili*, and yet that is good, and they affirmed the Judgment.

Wimbleton againſt *Holdrip.*

Obligation conditioned to do divers particular things, *performavit omnia* is not good without anſwering the particulars. S. C. 2 Keb. 710. Vide ante 301. 1 Saund. 49. 2 Saund. 177, 179.

DEBT on Obligation continued to do divers particular things in the Condition mentioned: The Defendant pleads *performavit omnia, &c.* and upon Demurrer it was adjudged an ill Plea, for the particulars being expreſſed in the Condition, he ought to plead to each particularly by itſelf; but where the Condition is to perform all the Covenants in an Indenture, there he may plead *performavit omnia* generally if they are all in the affirmative, without anſwering particularly to every particular.

* P. 304

* The King againſt *Page.*

Indictment in *Burgo*, and not ſaid *pro Burgo*, ill. 2 Hawk. P. C. 359. Stra. 313, 618, 865. Doug. 153, 791. 1 Term. Rep. B. R. 316.

AN Indictment was quaſhed, for that it was *ad generalem Seſſionem pacis Tent' infra Burgum de L.* not ſaying *pro Burgo*. And two other Indictments were quaſhed the ſame Term for the ſame Fault.

Pits againſt *Pelham*, in the Houſe of Lords.

Deviſe, that Lands ſhall be ſold, and not ſaid by whom. S. C. 2 Jo. 25. 2 Chan. Caſes, 205. 1 Chan. Caſes 35, 179, 180.

A MAN deviſes Lands to his Wife for her Life, and that after her death the Reverſion ſhall be ſold, and the Money ariſing thereby, diſtributed between his Heir and three Nephews; the Heir refuſes to ſell or to join with the Wife in the Sale; and on a Bill exhibited in Chancery againſt him, to compel him to join in the ſale, the Bill was diſmiſſed by the Lord Keeper *Bridgman*, who

Vide ante 224, *&c. ib.* 1 And. 145. 2 And. 59. Owen 155. Mo. 61, 341. 1 Rol. Abr. 666, 667. Cro. Car. 335, 382. 1 Jo. 327, 352. Cro. Eliz. 524. 2 Jo. 25, *&c.* Hob. 265. 2 Built. 257. 2 Leon. 220. 1 Chan. Rep. 32, 35, 176. Pow. on Dev. 292, 297. Cro. 464.

who held the Will to be void as to the Sale of the Reverſion, it not being ſaid who ſhall ſell: But in the Houſe of Peers, they on advice with the Judges reverſed the Diſmiſſion, and decreed, that the Heir ſhould ſell; for when no Perſon is appointed to ſell, it ought to be intended that he ſhall ſell who has the Eſtate, which is the Heir. See 5 *H.* 7. 12 *b.* by *Hide*, *Fenwick* and *Fineux*; a Deviſe that Lands ſhould be ſold and not ſaid by whom, they ſhall be ſold by the Executors; and to the ſame intent when they are to be ſold for Payment of Debts.

* Term. Sanct. Hill.

* P. 305

ANNO

22 & 23 Car II. in Banco Regis.

Ravenſcroft againſt *Ravenſcroft.*

RAVENSCROFT died inteſtate, leaving *Thomas* his eldeſt Son, and *Ralph* his ſecond Son, and divers other Sons and Daughters; *Thomas* the elder is made Adminiſtrator, and *Ralph* the ſecond Son appeals to have it repealed and granted to him, and alledges in the Delegates, That it was agreed between the Sons and Daughters, that *Ralph* ſhould be Adminiſtrator in truſt for all the younger Children; and that *Thomas* had

Adminiſtration granted according to the Statute repealed, when granted *inverſo ordine*, or by a Court which has not Juriſdiction. S. C. 2 Keb. 726. Ante 159.

Vide ante 157, 186. 1 Roll. Abr. 919. Yelv. 83, 125. 2 Lev. 55, 86, 90, &c. 1 Sid. 280, 293, 372. 1 Mod. 62. 2 Saund. 148. 6 Co. 18. Cro. El. 459. Ld. Ray. 63. Went. 6. 14. 1 Salk. 313. 2 Term. Rep. 597.

had 100*l. per Annum*, and all the younger Children nothing; whereupon *Thomas* prays a Prohibition, for that the Adminiſtration being granted according to the Statute, could not be repealed; and he had it except Cauſe were ſhewn *contra* at another Day; at which Day it was ſhewn, that there were other Allegations beſides thoſe before-mentioned, *viz.* That there were *bona Notabilia*; and ſo the Adminiſtration not grantable by the Biſhop of the Dioceſs, and that it was granted, not citing ſuch Parties as ought of right to be cited, and thereupon the firſt Rule was diſcharged; for when Adminiſtration is granted where it is not grantable, or if they proceed *inverſo ordine* or irregularly, there the Adminiſtration may be repealed by the Delegates notwithſtanding the Statute.

* P. 306

* *Horſey* againſt *Turges*, &c.

Executors ſubmit to an Award, the ſum awarded is not attachable, not being due to the Teſtator at the Time of his Death. S. C. 1 Vent. 111, &c. 2 Keb. 716, 731, 741. Vide 10 Co. 103. 1 Roll. Abr. 353, 554. Cro. El. 184, 691. Latch. 208. Dyer 247. Nelſon's Lutw. 310, 311, &c. 4 Bac. Abr. 692.

DEBT on Obligation conditioned to perform an Award, and on demurrer the Caſe was this; The Plaintiff as Executor, and the Defendants ſubmit all Controverſies, *&c.* The Arbitrators award, that the Defendant ſhould pay to the Plaintiff 300*l.* and a Creditor of the Teſtator attaches this in the Hands of the Defendants as the Teſtator's debt, and whether it was attachable as a debt of the Teſtator? was the Queſtion. For it was agreed it ſhould be Aſſets in the Hands of the Plaintiff when he recovered it, the Submiſſion of the Plaintiff being only as Executor. And it was argued for the Plaintiff, that this was not a debt due to the Teſtator, and the Cuſtom is to attach debts due to the Teſtator at the time of his death, which this was not, but only a debt due to the Executor; although perhaps ariſing on a Cauſe of Action, which was in the Teſtator, as a Breach of Covenant or the like, which ſounds only in Damage, which Damage is now diſcharged by the new Sum awarded: And if this debt be attachable in the Hands of the Creditor, by the ſame Reaſon may the debt due on the Obligation of Submiſſion, be attached in the Hands of the Executor himſelf; and to this Opinion, that the ſum awarded was not attachable in the Hands of the Defendants, *Twyſden* and

and *Rainsford* ſtrongly inclined; *Moreton* doubting upon the firſt Argument: And afterwards Judgment was accordingly given for the Plaintiff, and that the Sum awarded was not attachable.

The King againſt the Preſident and Counſel of the *Marches*.

A *Mandamus*, ſhewing, That *Henry Wynn*, was *debito modo conſtitut'* Secretary of the Courts of the *Marches*, by Letters Patents to be exerciſed by himſelf or Deputy; and that the Preſid ent and Counſel had put out *Luke Clapham* his Deputy, being duly conſtituted: They return, That at the Time * of the Delivery of the Writ of *Mandamus*, *Luke Clapham* was not conſtituted Deputy. *Per Cur'*. Tho. a *Mandamus* does not lie for a Deputy, yet it lies for him who deputes him, either to have him admitted or reſtored; for otherwiſe he may be deprived of his Power to make a Deputy. And this Return is ill, That at the Time of the Writ delivered he was not conſtituted Deputy; for perhaps they had put him out of his Place before the Writ came to them; and therefore a peremptory Writ of Reſtitution was awarded.

A *Mandamus* te reſtore a Deputy.

* P. 307 Vide ante 23, 65, 75, 123, &c.

Return, That at the Time of the Writ he was not conſtituted Deputy, is ill.

Taylor againſt *Becket*.

COVENANT againſt an Apprentice on his Indentures, for ſpeaking Words to his Maſter's Damage. The Defendant moved to change the *Venue*, for the Matter of Action is the Words, for which an Action on the Caſe lies; and the Action is brought by the Plaintiff only to elect his County for the Trial, and to ouſt the Defendant of his Privilege to change the *Venue*, as he might have done had it been an Action on the Caſe. But *per Cur'*, this Action is (properly) Covenant in which the *Venue* is not changeable.

Venue not changed in Covenant. Vide 2 Lev. 668, 670, &c.

White againſt *Stubbs.*

Replication, *de injuria ſua propria*, where the Bar contained an ill Title.
S. C. 2 Keb. 712, 735.
2 Saund. 294.

TRESPASS for entering his Cloſe, and taking his Goods, 9th of *October*, 20 *Car.* 2. The Defendant pleads, That *Ratcliff* was ſeized in Fee, and 23 *July*, 20 *Car.* 2. demiſed the Place where to the Defendant; and that he the 26th of *July* demiſed to the Plaintiff for a Quarter of a Year, which ended the 26th of *October*, 20 *Car.* 2. and for that the Goods were there after the Quarter of the Year ended, he took them Damage feaſant; *abſque hoc*, That he took them the 9th of *October*, or at any Time within the Quarter of the Year. The Plaintiff replies, *De injuria ſua propria abſque tali cauſa*; on which the Defendant demurs. And firſt it was reſolved, That the Replication *de injuria, &c. abſque tali cauſa* was ill, for that the Plea in Bar contained Title. And 2. That the Traverſe of the Plea was ill; for it may be * that he took them before the Quarter of the Year, and before the Demiſe to the Defendant by *Ratcliff*; wherefore Judgment was given for the Plaintiff. And it ſeems the Traverſe ought to have been *abſque hoc*, the 9th of *October*, or any Time before the 23d of *July*, or during the Quarter of the Year.

Traverſe, ill.

* P. 308
S. C. 2 Saund. 302, 303.
Raym. 194.
1 Vent. 98.
2 Keb. 688, 727, 737, 775.

The Dean and Chapter of *Windſor* againſt *Gower.*

Leaſe of Tithes for 4 Years, rendering 5*l. per Annum*, the Defendant aſſigns the Term. Q. If the Leſſe be chargeable, *&c.*
Tid. 1 Saund. 22, 23, 209, 268, 269.
3 Lev. 227.
Nelſ. Lutw. 299.

DEBT on a Leaſe of four Years of Tithes, rendering a Rent of 5*l.* The Defendant pleads, That he aſſigned his Term to *J. S.* and that the Plaintiff accepted him for his Tenant, and received the Rent reſerved, 6 *d. de reddit. prædict'*, The Plaintiff demurs, and three Queſtions were made and argued: 1. It was ſaid, That it was not a Rent, but a Sum in Groſs, and in Contract; for a Rent cannot iſſue out of Tithes. *Co. Lit.* 47. and then the Aſſignment and the Acceptance ſignify nothing in the Caſe. 2. The pleading Acceptance of the Rent, 6 *denar. de reddit. prædict.* is ſenſeleſs. 3. That the Acceptance by the Dean and Chapter cannot be pleaded without Deed, which is not done here.

here As to the 1*ſt*. it was ſaid, That the Privity of the Contract ſhall go with the Eſtate. 3 *Cro.* 636. *Buffkin* againſt *Edmunds*, the ſame Caſe. To the 2*nd*, That a Receipt of any Part is an Acceptance, and Receipt of the Whole. And to the 3*d*, That it may be paid in the *Chapter-Houſe*. The Court ſaid nothing as to the 1*ſt* and 3*d*, but gave Judgment for the Plaintiff on the 2*nd* for the Inſenſibility.

Vide 2 Lev. 231. Poph. 120. Raym. 162. 1 Sid. 402. 3 Lev. 495.

Mannington againſt *Guillims.*

REPLEVIN, Avowry for Rent charge for that *J. S.* ſeized of Rent bargained and ſold it to the Avowant: Iſſue thereon, That *J. S.* did not grant, and Verdict for the Avowant, that he did grant; and it was moved in Arreſt of Judgment, That here is a Bargain and Sale, and no Conſideration ſhewn, and ſo it is void: But *per Cur'*, after a Verdict, the Conſideration ſhall be intended to have been proved on the Trial, the Iſſue being *Non conceſſit*; for elſe the Jury could not have found for the Avowant, * if no Conſideration had been proved; and the Bargain and Sale was void. *Hutt.* 54. *Cro.* 165, 259. Wherefore Judgment was given for the Avowant.

Plea, Bargain and Sale of Rent without Conſideration, Iſſue *non conceſſit*, a Verdict cures the want of Conſideration. S. C. 1 Vent. 108. Raym. 200. 2 Keb. 693, 739.

* P. 309

Cole againſt *Green.*

WASTE in the *Huſtings London*, on a Leaſe for Years of a Brew-Houſe in *London*. The Defendant pleads no *Waſte*, and Iſſue thereon; and on the Evidence it appeared, That the Defendant took down the Brew-Houſe, and erected ſeveral Houſes in the Place, and improved the Rent from 120*l.* to 200*l. per Annum*; And by the Direction of *Howel* Deputy Recorder, before whom the Cauſe was tried; for that thereby the Nature of the Thing, and the Evidence thereof was altered, the Jury found it *Waſte*, and gave ſingle Damages 200*l.* which were trebled to 600*l.* But then Judgment was arreſted, on Motion before Sir *William Wilde*, the Recorder himſelf, for the Inſufficiency

Converting Brew-Houſes, &c. into Tenements of greater Value, is Waſte. S. C. 2 Saund. 352, to 259. 1 Mod. 94. 1 Danv. 311. Vide 1 Rol. 507. 2 Rol. 815. Co. Lit. 53. Lit Rep. 266, 295. Dy 37, 261. Hob. 234, &c.

ciency of the Verdict; becauſe the Writ of the Count are *quod fecit vaſtum venditionem & deſtructionem*; and the Jury found *fecit vaſtum, venditionem & deſtructionem, ſcil.* in pulling down the Brew-Houſe, and taking away the Coppers, and the other Particulars, *&c.* but did not find any Sale of any of the Particulars, upon the Book-Caſe in *Long* 5 *E.* 4. 100. In Waſte for felling and felling of Trees, the Defendant pleads, That he felled them and employed in Repairs; and the Plea adjudged ill, becauſe it did not traverſe the Sale. And although to this it was anſwered, That though in a Plea the Sale is material, becauſe if he ſold them it is Waſte, although he repurchaſe them and imploy them in Repairs; and therefore the Sale is there traverſable, ſo that it may appear to the Court, whether the employing them in Repairs be Waſte or not; yet when *in a Verdict* the Waſte is found, it is ſufficient whether they are ſold, or not: But (notwithſtanding) the Verdict for the ſaid Exception ruled to be inſufficient, and a Rule made for a new Trial; whereupon the Jury, in reſpect of the Melioration, or Improvement, by the Direction of Sir *William Wylde*, before whom the new Trial was, gave a Verdict for the Defendant, and Judgment was thereupon given for the Defendant.

The Jury found no Sale 2 Saund. 252, 255. 2 Show. pl 4.

On which Judgment *Cole* brought a Writ of Error before *Vaughan* Chief Juſtice of the Common Pleas, *Hale* Chief Baron, *Turner*, and *Rainsford*, and *Moreton* Juſtices, aſſigned at * St. *Martins le Grand*; and upon hearing of Counſel before *Howel* Deputy Recorder, the Judgment; and both the Verdicts, and the Rule for the New Trial (which was *quia videtur Cur' quod verdict' prædict. eſt vitioſum & erroneum, ideo caſſetur, & habeatur nova triatio*) were all certified. And before the ſaid Juſtices aſſigned, four Points were argued and adjudged, *viz.* 1*ſt.* That the firſt Verdict was ſufficient for the Reaſon before alledged. *Raſt. Entr.* 695. *b.* 696. *a.* 689. *Paſch.* 7. *Eliz.* 3. *Pl.* 1. 2*ly*, That both the Verdicts and the Rule were well certified at firſt on the Writ of Error, becauſe the Huſtings being an inferior Court, no Diminution can be aledged of certifying more than is certified at firſt; and if the firſt Verdict be not certified, and the Rule, *&c.* the Erroneouſneſs of

* P. 310 Verdict ſet aſide and a new Trial, and contrary Verdict, and Judgment, and thereon Error brought, and all certified without Diminution.

of the Proceedings in the Huſtings cannot appear, and ſo no Remedy be on the Writ of Error; and for this were cited 8 *Co.* 65. *Loveday*'s Caſe, *Co. Entr.* 252. *Donal*'s Caſe. 3*dly*, That the Court here ought to reverſe the Judgment, becauſe the Court below erred in ſetting aſide the firſt Verdict as inſufficient, where it was ſufficient. 4*thly*, That the Court here ought to give the ſame Judgment here for the Plaintiff on the firſt Verdict, as the Court below ought to have given; and this by Virtue of the Words in the Writ of Error, *Et ulterius facturi quod ad juſticiam pertinet ſecundum leges regni & conſuetudinem civitatis prædict'*, and though no Precedent was produced of ſuch a Thing done before in this Caſe, yet they ſaid they would preſume the Cuſtoms of *London* to be according to the Common Law, if no Precedent be ſhewn to the contrary: And upon this all the Judges agreed, and reverſed the Judgment, and gave Judgment for the Plaintiff on the firſt Verdict.

Vide 2 Saund. 254, 255.

Judges at *St. Martins* ſhall give the ſame Judgment as the Court in the Huſtings ought to have given. 2 Saund. 256, 257. Bro. Error 105.

On which Judgment of Reverſal the Defendant brought a Writ of Error in the Houſe of Peers, and aſſigned Error, That the Jury did not come from the four next Wards, which by the Cuſtom of *London* they ought; whereupon the Defendant in the Error pleads, *in nullo eſt erratum*, and on Argument there, the Lords, with Advice of the Judges, reſolved theſe Points. 1. That it was not aſſignable for Error, being contrary to the Record, becauſe the Award of the *Venire Facias* is *de quatuor proximis Wardis*, and the Writ is returned ſerved accordingly, and is not like to the Caſe 3 *Cro.* 320. nor 1 *Roll. Abr.* 761. *M.* 3. which are from more inferior Courts, where it was aſſigned, That one named *Alderman* was not an * Alderman, and one named *Steward* of St, *Catherine*'s was not Steward: But the Courts and Cuſtoms of the City of *London* are confirmed by Act of Parliament, and are like the Grand Seſſions of *Wales*, or the Place Court; and 1 *Roll. Abr.* 758. N°. 4. is: It cannot be aſſigned, That the Deputy of the Grand Seſſions before whom the Court was tried, was not Deputy; and *Molins* and *Neſby*'s Caſe, *Trin.* 14. *Car.* 2. *B. R. Rot.* 1091. and *King* and *Allen*'s Caſe in the ſame Court, it cannot be aſſigned, That the Judge of the *Marſhalſea* was not Judge or preſent

Error contrary to the Record, not aſſignable. 2 Saund. 258, 257.

* P. 311

in

In nul's, &c. is a Demurrer, but does not confeſs any Error in Fact nor well aſſigned.

in Court. *Secondly*, That *in nullo eſt erratʼ* is a Demurrer, but though there is an Error in Fact, it is not confeſſed by the Demurrer, it not being aſſignable; but the Demurrer is thereupon in Point of Law becauſe not aſſignable; on which the Judgment was affirmed, and remanded to St. *Martins* to be executed; and there it was objected, That they could not execute it, becauſe they had no Seal to ſeal the Execution; but for that a Precedent was produced, Dated 11 *Junii* 22 *Eliz.* between *Crowther* and *Gee*, where in the like Caſes, the Juſtices ſealed the Writ of Execution with their particular Hands and Seals, and ſo the Court reſolved to have done here: But before it was done, *Green* the Plaintiff in the Error died, not having any Goods in *London*, and *Forth*, Alderman of *London*, claiming by a Leaſe under *Green*, had preferred his Bill in Chancery to be relieved, &c. and prayed an Injunction thereby, this *Waſte* being a *melioration*: But he to have an Injunction was ordered by the Court to enter into a Recognizance to anſwer for *Green*, being an ancient Man; and on hearing of the Cauſe there, in regard there had been one Verdict for the Plaintiff, and another for the Defendant, the Lord Keeper *Bridgman*, after all thoſe Proceedings, directed a new Trial at the King's Bench Bar, to try in a feigned Iſſue, *Whether Waſte or not?* And on the Trial before *Hale*, then Chief Juſtice, it was reſolved to be Waſte notwithſtanding the *melioration*, by Reaſon of the Alteration of the Nature of the Thing, and of the Evidence thereof; and the Jury gave their Verdict accordingly, and 100 Marks ſingle Damages, which trebled, amounted to 200*l.* which the Chancery compelled *Cole* to take.

Juſtices at St. *Martin's* in Error, how to grant Execution.

Chancery after Verdict and Judgment affirmed in Error, grants a new Trial. 2. Hawk. P. C. 411, 419. Stra. 470.

Cole to have Execution of the Place waſted, had the Record tranſmitted by *Certiorari* immediately from the Juſtices at St. *Martins*, into the King's Bench, (without having it certified into Chancery; and ſent from thence by * *Mittimus* into the King's Bench) and from thence iſſued a *Scire Facias* againſt the Adminiſtrator of *Green*, and againſt *Forth* and others, ſurmiſing that they had entered into the Place waſted, and ſtill held it, and they come in and demur upon the Writ thus, *viz.* For that the Plaintiff ought not to

* P. 312 Vide 1 Saund. 98, 99.

have

have Seiſin, becauſe *non conſtat'*, that *Forth* entered on a Title under *Green*. *Secondly*, For that the Record is not legally removed into this Court to be executed, *unde petit judicium de breve & quod breve prædict' caſſetur.* And now four Queſtions were reſolved by the whole Court, *viz. Firſt*, That the Record was lawfully removed immediately into this Court by the *Certiorari*, without any *Mittimus* from the Chancery, on the Precedents *Reg.* 209. *F. N. B.* 242, 246. *B.* 190. *F. Reg.* 160, 285. & *F. N, B.* 243. *Secondly*, That it being in this Court, this Court may execute it notwithſtanding *Hutt.* 117. *Riſham* againſt *Goodwin*, That this Court cannot execute the Judgments of inferior Courts; and this Reſolution was grounded on *Paſch.* 22. *H.* 7. *Rot.* 369. *Raſtal's Entr.* 531. *Aſhton's Placita Rediviva* 145. *Mich.* 3. *Jac.* 1. *B. R. Rot.* 2311. *Hill.* 3 *Jac.* 1. *Co. B. Rot.* 1919. *Paſch.* 4 *Jac.* 1. *B. R. Rot.* 337. *Bre. Judicialia* 130. *Hill.* 9 *H.* 4. *Rot.* 130. *Theſaures Brevium* 40, 41, 42. *Raſt. Entr.* 169, 192. *Co. Entr.* 180, 342. *Reg.* 170. *F. N. B.* 242, 243. *Thirdly*, That the *Scire Facias* was good, without ſhewing by what Title *Forth* entered; and this was grounded on *Raſt. Entr.* 236. *Moyle* 160. 2 *Bro.* 110. *Bre. Judicialia* 155, 253. *Raſt. Entr.* 279, 452. *Reg. Judic.* 20, 50. And generally in Recoveries in real Actions the *Scire Facias* is againſt *ſuch and ſuch who entered*, &c. *Fourthly*, It was reſolved by all the Juſtices, That the Plaintiff ſhould have Judgment to have Execution, and not *reſpondeas ouſter*, becauſe although the Concluſion of the Demurrer is in Abatement, yet the Commencement being in Bar, the Judgment ſhall be peremptory. *Mich.* 15 *Car.* 2 *B. R. Rot.* 703. and ſo it was; and the Plaintiff had Execution accordingly. *Norton* and *Levinz.* were for the Plaintiff *Cole* throughout this whole Cauſe, and *Finch*, *Jones* and others for the Defendant.

Record certified immediately from St. *Martin's* into *B. R.* without *Mittimus* out of Chancery.

The King's Bench may execute the Judgments of Inferior Courts.

Scire Facias againſt the Tenants in Poſſeſſion, *quia ingreſſi ſunt* good, without ſhewing Title. Ante 83, 310. Plea commencing in Bar, though it concludes in Abatement, yet Judgment peremptory. 2 Show. 4. 2 Mod. 63, 64. 1 Mod. 214. Ante 85.

So where Matter in Abatement is pleaded in Bar, and concluded in Bar, Judgment ſhall be Final. 6 Mod. 102.

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THE

REPORTS

OF

SIR CRESWELL LEVINZ, KNT.

LATE ONE OF THE JUDGES

IN THE

COURT OF COMMON PLEAS,

AT

WESTMINSTER,

Containing

CASES

HEARD AND DETERMINED IN THE

COURT OF KING'S BENCH,

During the Time that Sir MATTHEW HALE, Sir RICHARD RAINSFORD, and Sir WILLIAM SCROGGS were Chief Juſtices there; as, alſo, of certain Caſes in other Courts at WESTMINSTER during that Time;

Tranſlated into Engliſh

BY MR SERJEANT SALKELD, and others,
OF THE MIDDLE TEMPLE.

With two Tables,
The one of the NAMES of the CASES, and the other of the PRINCIPAL MATTERS contained therein.

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Carefully corrected; with many Thouſand References to Modern Authorities never before printed.

BY THOMAS VICKERS, ESQ. BARRISTER AT LAW.

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Termino Paſchæ,

ANNO

23 Car. II. in Banco Regis.

PART II.

Fellows againſt *Kingſton.*

DEBT upon the Statute of *E.* 6. for Tithes, and declares that he is Rector of the Churches of *Dale* and *Sale* and the Defendant being Occupier of 400 Acres of Land in *D.* and *S.* had ſown the ſame, and carried off the Corn untithed: After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That he ought to have ſhewn which Part of the Lands lay in *D.* and which in *S.* that the Defendant might know how to anſwer particularly to each Parcel ſeverally, for he might have a good Title to one Church and not to the other. But by *Hale* and the Court, 'Tis good, for this Action is in Nature of a Treſpaſs founded upon the Tort; ſo the Exception diſallowed, and Judgment given for the Plaintiff. *Vide Poph.* 208.

Debt for Tithes in *D.* and *S.* not ſhewing how much in *D.* and how much in *S.* good. S. C. 1 Vents 126. 2 Keb. 756.

* P. 2 * *Hopkins verſus Robinſon.*

Preſcription *pro ſola paſtura* is levant and couchant, 8, C. 1 Vent. 128, 163. 2 Saund. 324. 1 Mod. 74. 2 Keb. 758, 842. Vide 1 Lev. 253, 268, &c. *ibid.* Raym. 171, 1 Vent. 383. Vaugh. 253. Vide 3 Lev. 98, Poſt. 252.

REPLEVIN, and avows Damage feaſant in his Freehold; the Plaintiff in Bar pleads a Cuſtom for the Copyholders of the Manor, to have *ſolam paſturam omni anno omni tempore anni*, and that he by Licence of a Copyholder put in his Beaſts; upon Iſſue no ſuch Cuſtom, and Verdict for the Plaintiff, it was moved in Arreſt of Judgment. *Firſt*, That the Cuſtom being to have *ſolam Paſturam* and to exclude the Lord was not good. *Secondly*, It is not averred that the Beaſts were levant and couchant upon the Copyhold. *Thirdly*, Commoners ought to eat the Graſs by the Mouths of their own Cattle, and not by the Mouths of Strangers Cattle, 2 *Cro. Monk* againſt *Butler*. *Fourthly*, If he may licence another, yet ſuch Licence cannot be without Deed; to which it was anſwered, *Firſt*, That the Cuſtom is good, *Co. Litt. a.* for this is not Common but Paſture, and he does not exclude the Lord from all the Profits, but the Paſture only, and the Lord ſhall have the Mines, Coals, Trees, Timber, &c. *Secondly*, Here needs no Levancy and Couchancy, for the Copyholders are to have the whole Paſture, and not to have Common only, for ſuch Cattle as are levant and couchant upon their own Tenements, which is the Meaſure of their Common. To the 4*th*, A Licence *pro hac vice tantum* is good by Parol, not if it were for a Time certain; for that would amount to a Leaſe of a Thing in Grant, which cannot be without Deed. And to the 3*d*. This being a Right of Paſture and not of Common, the Herbage may be eaten by the Beaſts of Strangers, though otherwiſe perhaps if it were Common; which is not reſolved to the Contrary in *Monk* and *Butler's* Caſe. To all which *Hale* Chief Juſtice inclined. *Sed adjournatur*. But after, as I was informed, for I was not there preſent, Judgment was given for the Plaintiff.

Licence to Common without Deed, when good. Vide Raym. 171. Pollexf. Rumſey *verſus* Rawſon.

Common cannot be taken by Strangers Cattle. Poſt. 252.

Baſil

* *Davis* againſt *Reyner*. * P. 3

ASSUMPSIT, and declares, That *J. S.* deviſed a Legacy to the Plaintiff, and made the Defendant Executor; and the Plaintiff intending to ſue him for the Legacy, the Defendant in Conſideration of Forbearance, promiſed to pay him. The Defendant pleaded divers Bonds and Judgments, and *nul Aſſets ultra*, upon which the Plaintiff demurred, and had Judgment without Argument; for it is not material whether he had Aſſets, or no, for he is charged upon his own Promiſe in Conſideration of Forbearance, and a Forbearance of Suit for a Legacy, is a ſufficient Conſideration.

Aſſumpſit in Conſideration of Forbearance of a Legacy, good, tho' no Aſſets. S. C. 1 Vent. 120. Raym. 211, 212. 2 Keb. 744. 758. 1 Danv. 53. pl. 33. Vide 1 Keb. 866. 1 Sid. 243. Poſt. 20.

Pinkeny againſt *Bullock*.

DEBT upon an Obligation, conditioned to perform an Award: Defendant pleads no Award. The Plaintiff replies, and ſets forth an Award, That the Defendant ſhould pay the Plaintiff 10*l.* and the Plaintiff ſhould pay the Defendant the Expences in making the Award, and that upon Performance of all, each ſhould releaſe generally to the other, and aſſigns for Breach Non-payment of the 10*l.* The Defendant demurs. And now *Jones* argued, That this Award was void being not mutual, for nothing is awarded to the Defendant but the Releaſe, and that is not to be made till all the reſt be performed, which can't be; for the Award of Expences in making the Award is void, being Matter ſubſequent to, and out of the Submiſſion. But *Hale* Chief Juſtice inclined, That the Releaſe ought to be made upon the Performance of what is well awarded, and not be delayed till the Performance of that Part which is void, and ſo the Award will be good; but it was adjourned.

Award that one pay 10*l.* and the other the Expences of the Award, and upon Performance general Releaſes, if the Award be good for the Releaſes, or all void. Vide 1 Vent. 121. 3 Lev. 414. 2 Keb. 761. 759. 834. 2 Danv. 526. 19. Vide Poſt. 235.

Note. Afterwards the 7th of *W. & M.* in a Caſe between *Bargrave* and *Atkins*, but entered, *Hill.* 5. *Com. Banc. Rot.* It was adjudged upon an Award like this, where the aforeſaid Objection was made by *Levinz*, That upon Performance of what is well awarded the

Vide 3 Lev. 413.

Release ought to be made, and that the Award is good.

* P. 4

* *Hulme* against *Saunders.*

Rent reserve annually 1 Sept. by equal Portions Action for a Year and half's Rent. S. C. 2 Keb. 748, 804. Vide Post. 99. 3 Mod. 41, 70. 2 Vent. 129. 2 Danv. 508. Debt and demands less than is due.

ERROR of a Judgment in *B. R.* in *Ireland*, in Debt for Rent, where the Plaintiff declared of a Leaſe, paying the 1ſt of *September* annually 74 *l.* by equal Portions, and demands 100 *l.* for a Year and half's Rent; and upon *Nil debet* Verdict and Judgment for the Plaintiff: And now it was aſſigned for Error, 1ſt. That the Rent is a Duty payable annually the 1ſt of *September*, and the Words *by even Portions* vain and idle, and no Half-year's Rent can be due. 2d. The Rent for a Year and half is 111 l. and he demands but 100 l. which is leſs than is due; and yet 'tis not ſhewn how the reſt was diſcharged. The Court held, That Judgment ought to be reverſed for both Cauſes; but this being the firſt Time of Argument, and no one there for the Defendant, it was adjourned.

Methin againſt the Hundred of *Iſtleworth.*

Inhabitants finding the Robber in the Preſence of a Juſtice of Peace, and charging him, ſhall excuſe the Hundred. S. C. 1 Vent. 118, 225, 235. Raym. 221. 2 Keb. 760. 3 Keb. 115.

ACTION upon the Statute of *Winton:* The Defendants plead a *Hue and Cry* levied, and that within forty Days they took one of the Robbers; and on Iſſue, that they did not take any of the Robbers, a Special Verdict found, That Sir *Joſeph Aſh*, one of the Inhabitants, finding *Dudly*, one of the Robbers, in the Preſence of Sir *Philip Howard*, a Juſtice of the Peace, he deſired him to commit *Dudly*; and *Howard* undertook that he ſhould appear next Seſſions, and he accordingly did appear, *& ſi, &c.* And now it was argued, That this was no Caption by Purſuit within the Statute to excuſe the Hundred, but a caſual finding him in the Company of a Juſtice of Peace, and a Requeſt to commit him: But on the other Side it was argued, That here is found to be a *Hue and Cry*, and Purſuit, and charging him in the Preſence of a Juſtice of Peace, who had him in his Power at that Time, and this is ſufficient; to which *Hale* * Chief Juſtice inclined: *Sed adjournatur.* But afterwards *Hill.* 24 & 25. in

* P. 5

25. it was ſo adjudged, *Jones* for the Defendant, *Saunders* for the Plaintiff.

Vere againſt *Smith.*

DEBT upon an Obligation, by the Plaintiff a Brewer, againſt the Defendant his Clerk, conditioned to perform Covenants, to account for all Sums of Money he ſhould receive. Defendant pleads, Covenants performed. The Plaintiff replies, That ſuch a Day 26*l.* came to his Hands, for which he has not accounted. The Defendant rejoined, That he accounted *modo ſequente, viz.* That certain Malefactors broke into his Counting-houſe and ſtole it, wherewith he acquainted the Plaintiff, *Et hoc paratus eſt verificare*; upon which the Plaintiff demurred: And now it was argued, 1 ſt. That the Rejoinder is a Departure, for fulfilling a Covenant to account, can't be intended but by actual accounting; whereas the Rejoinder does not ſhew an Account, but an Excuſe for not accounting. 2. The Rejoinder ought to conclude *al Pais*, being an expreſs Affirmative, that he accounted, in Contradiction to what was denied in the Replication, that he did not account. *Cur' contra.* To the 1 ſt. this is an Account, and no Departure; to the 2*d.* it was better to conclude as here, than to the Country; for now the Plaintiff hath Liberty to traverſe the Robbery. *Adjournatur.* But after in *Trinity Term* the Demurrer was waved, and Iſſue taken upon the Robbery.

Pleads, That he accounted, Rejoinder, that he was robbed, whereof he gave Notice. S. C. 2 Keb. 761, 779, 830. 1 Vent. 121. Vide 6 Mod. 139.

Breach, That he did not account; pleads, He accounted *tali modo*, and does not conclude *al Pais*.

Dennis againſt *Dennis.*

ERROR in Fact aſſigned in a Judgment in Dower, *viz.* That the Tenant was an Ideot, and appeared by Attorney. Iſſue being taken upon the Ideocy, the Plaintiff gave Notice of Trial next Aſſiſes, and after countermanded it; nevertheleſs the Defendant in Error carried it down to Trial the ſame * Aſſizes without a *Proviſo*; and held good *per Curiam*, for he was an Actor in the firſt Suit, and is the Party delayed by this Means; and the Iſſue was found for the Defendant in Error, and the Judgment affirmed; and a Precedent was cited, wherein it was ſo done in a Writ of Error out of *Ireland*.

Tenant in Dower may try an Error in Fact, aſſigned the firſt Aſſizes without Proviſo. S. C. 1 Saun. 335. 2 Keb. 76

* P. 6

Coke

Coke againſt *Whorwood.*

Award, that one ſhall be bound with Surety, good as to the Party, void as to the Surety.
S. C. 2 Saund. 287.
2 Keb. 767.
Vide 3 Lev. 153.
2 Saund. 337.
Cowp. 290.
Burr. 277, 278.
2 Bac. Abr. 35.

ASSUMPSIT to perform an Award by which the Arbitrators awarded, the Defendant ſhould be bound with ſufficient Surety to the Plaintiff for the Payment of a certain Sum of Money; and for Breach aſſigns, That the Defendant did not become bound to the Plaintiff *modo & forma* as was awarded; and upon Demurrer it was adjudged, that though the Award was void as to the finding of Surety, it was good as to the Defendant himſelf, and the Breach well aſſigned, that he did not become bound; and the *modo & forma* only ſhall relate to himſelf, and not to the Surety.

1 Salk. 74.

Polixfen againſt *Polixfen.*

Appellant dies, Appeal abates not.
S. C. 1 Vent. 133.
2 Keb. 768. 778, 779.
Vide 1 Leon. 278.
2 Bulſt. 2, 3.
2 Cro. 483.
5 Mod. 338.
4 Com. Dig. 496.
3 Term. Rep. 3.

SENTENCE being given in the Eccleſiaſtical Court upon a Will, the Defendant appealed, and hanging that, died; and now the Defendant his Brother, came in and proſecuted the Appeal in Lieu of the firſt Appellant; upon which the Plaintiff prayed a Prohibition; for by the Appellant's Death the Appeal is abated, and the Commiſſion determined: But a Prohibition was determined for the Delegates are the proper Judges, whether or no the Appeal be abated by their Law; and though it be abated according to the Rules of our Law, yet it may be otherwiſe in their Law; the Matter is wholly of their Conuſance, and the Commiſſion is not determined by the Death of the Appellant.

*P. 7

* *Watton* againſt *Weddington.*

Pleas in the Words of the Condition, good, and the Court to expound.
2 Salk. 520.
1 Saund. 316.

DEBT on a Bond conditioned, If a Ship going ſuch a Voyage return, the Perils of the Sea excepted, the Defendant ſhall pay ſo much, but if the Ship be loſt, nothing, and the Obligation to be void: The Defendant pleaded that the Ship proceeded in her Voyage ſuch a Day, and in her Return was loſt: Upon

which

which the Plaintiff demurred, becauſe it was not ſaid the Ship was loſt *per pericula maris*, according to the Words in the firſt Part of the Condition, for it might be loſt by the Party's own Negligence: But *per Cur'*, The Plea being in the Words of the latter Part of the Condition, which makes the Obligation void, as well in Caſe the Ship be loſt, as if it return, Perils of the Sea excepted, and the Defendant pay; the Plea is good, and Judgment was given for the Defendant. *Jones* for the Plaintiff.

The King againſt *Drury*.

INDICTMENT upon the Statute of *Uſury*, for taking 7 *l.* 10 *s.* for the Uſe of 300 *l.* for a Quarter of a Year, upon *Non Cul'* it was tried by *Niſi prius* before *Hale* Chief Juſtice at *Guild-Hall*, where upon Evidence the Caſe fell out thus: *Brown* had a Leaſe from the Earl of *Suffolk*, of a Houſe for forty Years, at the Rent of 5 *l. per Annum*, *Brown* agreed with *Drue* to aſſign the Term to him for 300 *l.* but *Drue* having not the Money, *Drury* by Agreement with *Drue*, paid the 300 *l.* and took the Aſſignment to himſelf, and then *Drury* let the Houſe to *Drue*, for thirty-nine Years and three Quarters of a Year, after the Rent of 35 *l per Annum*, of which 5 *l.* was to be paid to the Earl of *Suffolk*, and the remaining 30 *l.* to *Drury* for his own Uſe. *Drue* covenanted to pay the Rent, and with other Covenants which are uſual in Leaſes, as for Repairs, &c. and *Drury* covenanted, That if at the End of four Years *Drue* paid the 300 *l.* then the Rent ſhould ceaſe, and he would convey the Reſidue of the Term to *Drue*. *Per Hale* Chief Juſtice This is not Uſury within the Statute, for *Drue* was not obliged to pay * the 300 *l.* to *Drury*, but is at his Election to pay it if he will, and determine the Rent by that Means and have the Term; ſo that it is no more in Effect than a Bargain for an Annuity of 30 *l.* yearly for thirty-nine Years and three Quarters, for 300 *l.* to be ſecured in this manner, determinable ſooner if the Grantor pleaſes; but the Grantee hath no Remedy for his 300 *l.* and cannot recover it, unleſs the Grantee thinks fit to pay it back at the End of

Not Uſury to accept a Leaſe for 300 *l. per Annum*, conditioned to be void if he be paid his 300 *l.* at the End of four Years, For it is but an Annuity determinable by the Grantor, when he pleaſes. 3 Wils. 393. 2 Bl. Rep. 861. Cowp. 114. 770, 793.

* P. 8

Vide Law Uſury

of the four Years, and ſo the Acceptance of the 7 *l.* 10 *s.* is not Uſury.

But if *Drury* had took Security for Re-payment of the 300 *l.* or it had been by any collateral Agreement to be repaid, and all this Method of Bargaining a Contrivance to avoid the Statute, this had been Uſury; but as it is, it is no more than the Purchaſe of 30 *l.* Annuity for thirty-nine Years and three Quarters, for the Sum of 300 *l.* determinable by the Grantor at the End of four Years if he pleaſes; and accordingly the Jury found the Defendant Not guilty.

* Term. Sanct. Trin. *P. 9

ANNO

23 Car. II. in Banco Regis.

Croſſing againſt *Scudamore.*

TRESPASS for breaking his Cloſe; The Defendant juſtifies as done in the Freehold of *Hook*, Plaintiff replies it is his Freehold, *abſque hoc* that it is the Freehold of *Hooke*; upon which an Iſſue and Special Verdict, That *Nicholas Hooke*, whoſe Heir the Defendant is, was ſeiſed in Fee, and 16 *Decemb.* 1640. in Conſideration of Affection to his Daughter under whom the Plaintiff claims, made a Deed to his Daughter, inrolled within ſix Months, whereby in Conſideration of Affection, and for her Portion and Preferment, and other valuable Conſiderations, he bargained, ſold, aliened, infeoffed and confirmed to the ſaid Daughter, the Lands in Queſtion, with a Clauſe of Warranty, and a Covenant for farther Aſſurance; and that the Indenture was made for the Conſideration aforeſaid, and no other. (No Money was found to be paid) *Et ſi pro querente pro querent': Et ſi non* for the Defendant. And if this Indenture ſhould inure as a Covenant to ſtand ſeiſed? was the ſole Queſtion. It was argued for the Plaintiff, That it ſhould operate as a Covenant to ſtand ſeiſed; and for this was cited *Co. Litt.* 49. the Intent of Parties is to be fulfilled where it can by any Rules of Law 2 *Roll.* 598. There are ſeveral Caſes of this Nature, though the Words be improper. 8 *Co.* 94. a Demiſe and Grant amounts to a Bargain and Sale. 11 *Co.* 24, 25. A Marriage-Covenant to ſtand * ſeiſed to

Bargain and Sale without Money, operates as a Covenant to ſtand ſeiſed. S. C. 1 Vent. 137, 138. 1 Mod. 175, 176. Cart. 137, 138. Poſt. 213. 3 Lev. 372. Vide poſt. 213, 225, 226. Nelſon's Lutw. 243.

* P. 10

to the Uſe of his Daughter, inrolled, allowed to operate as a Bargain and Sale. 2 *Roll.* 789. *pl.* 30. 7 *Co.* 40. 2 *Roll.* 785. *pl.* 25. And as to *Co. Litt.* 49. *a.* where it is held, That when a Warrant of Attorney is in the Deed, it ſhall not inure by way of Uſe againſt the Parties manifeſt Intent to have it inure as at Common Law; the contrary hath been adjudged; and as to *Pitfield* and *Pierce*'s Caſe, 2 *Roll.* 789. the Deed was void in the very Frame of it; and in the Caſe cited *Hill.* 13 & 14 of this King, in this Court, the Deed was no more than Articles for making a future Deed of Settlement: And in *Oſborne* and *Juge*'s Caſe, 2 *Cro.* 217. the Reaſon the Court would not adjudge it to inure by way of Uſe was, becauſe they found out another way to make it good, by making it operate as a Confirmation, the Party being in Poſſeſſion; and ſo the Deed good. *Laſtly*, They relied upon the Caſe of *Tebb* againſt *Popplethwaite*, 2 *Roll.* 786, 787. as a Caſe in Point.

Vide 3 Lev. 371, 372. & poſt, 225.

On the other Side was cited *Co. Litt. ut ſupra* 49. *a.* That as the Party's Intent plainly appearing by the Letter of Attorney in the Deed to paſs it at Common Law, it ſhall not paſs by way of Uſe; ſo here the Warranty in the Deed ſhews the Party's Intent was to paſs it at Common Law; for otherwiſe the Warranty will be of no Effect, and every Conveyance which in its ſelf is void, ſhall not be made good by converting it into a Uſe; for this will introduce the utmoſt Incertainty and Barbarity. 3 *Cro.* 856. *Dyer* 69, 302. 3 *Cro.* 394. 2 *Roll.* 786. and *Pitfield* and *Pierce*'s Caſe, *Foſter* and *Foſter*'s Caſe before cited; and as to the Caſe of *Tebb* and *Popplethwaite* in 2 *Roll.* 786. it was ſaid, Judgment was given contrary to the Opinion reported. *Hale* Chief Juſtice, and *Twyſden* held clearly upon the firſt Argument, That this Deed might operate by way of Covenant to ſtand ſeiſed; and with the Conſent of *Rainsford* and *Moreton*, gave Judgment for the Plaintiff: Upon which the Defendant immediately brought a Writ of Error in the Exchequer-Chamber, where the Judgment was affirmed; ſo that it is now the Judgment of all the Judges of *England*; *Winnington* for the Plaintiff in *B. R.* and *Finch* Attorney General for the Defendant.

Vide 2 Vent. 318. 2 Roll. Abr. 788, 789. 2 Lev. 225. 2 Jo. 105. 2 Show. Caſe 7.

Coleman

* *Coleman* and others againſt *Bard* and *Nelms.* * P. 11

TROVER *inter alia de Viginti menſuris*, without an *Anglice*, or ſpecifying what Meaſures: *Et de viginti duodenis* Anglice *groſs*, *hamaram* Anglice *Hooks*, not ſaying what *Hooks*; moreover *duodenis* being an Adverb, which ſignifies twelve Times, 'tis here inſenſible; but *Duodenis Duodecim* is *Latin* for a Groſs, *ſcilicet*, twelve Times twelve, and ſo it is in the Dictionary; and for theſe Faults Judgment was ſtayed upon the Motion of *Levinz*, and the Plaintiff for expedition, and to commence a new Action, prayed a *Nil capiat per billam*; which accordingly was entered.

Trover *de viginti menſuris & duodenis hamarum*, naught. Vide 3 Keb. 14, 153. 1 Sid. 98. 1 Vent. 114. Palm. 393. Latch. 216. 2 Roll. Rep. 36. 1 Bulſt. 186. Style 25. 224. 247. 358. 1 Lev. 301.

1 Danv. 24. *&c. ibid.*

Holbech againſt *Bennet.*

ERROR of a Judgment in Replevin *in Communi Banco*, wherein *Bennet* was plaintiff, for taking his Beaſts in *Fillingly-Field* in *Fillingly*; and *Holbech* avowed for that the Mayor and Commonalty, and divers other particular Perſons by Name were thereof ſeiſed, and by their Indenture dated the 11th of *March* 1647. *teſtatum ſit*, that they demiſed to *Bennett* for twenty-one Years; and by Indenture the firſt of *May*. 11 *Regis nunc Teſtatum ſit*, That he aſſigned to *Holbech*, and that 10. *Octobris* 11°. *Regis Holbech* at *Fillingly* aforeſaid, demiſed to *Bennett*, rendering Rent, and for Rent arrear he avowed: The Plaintiff *Bennett*, in Bar ſaid, That *Holbech* did not demiſe the ſaid firſt of *October* at *Fillingly* aforeſaid, *modo & forma prout*, upon which Iſſue and Verdict for the Plaintiff *quod non dimiſit primo Die Octob. apud* Fillingly *modo & forma prout, &c.* upon which Judgment for the Plaintiff: And now it was aſſigned for Error, That this was an immaterial Iſſue, making the Day and Place of Demiſe Parcel of the Iſſue; for a Demiſe at any other Time and Place had ſufficed to maintain this Avowry, they being inſerted only for Conformity in * Pleading, but that the Plea ſhould have been generał, *non demiſit modo & forma prout,*

Day and Place made Parcel of the Iſſue. S. C. 2 Saund. 317. 2 Keb. 750. 769. 789. 825. Vide Latch. 93. Dyer. 219. 2 Cro. 550. 1 Jo. 93. 6 Mod. 2. 11. 2 Lev. 135. Doug. 114. 135. 1 Term. Rep. 782.

* P. 12

prout, and the Time and Place omitted in the Traverſe, becauſe they are not traverſable; and then the Avowant might have given in Evidence a Demiſe at another Time and Place, which had been ſufficient to maintain his Avowry for the Rent; of which Benefit he is now deprived by the Plaintiff's ill Bar, and the Court cannot know for whom to give Judgment according to the Right of the Matter; wherefore this Caſe is not remedied by the new Statute, (though the contrary was urged for the Plaintiff) the Statute being only to cure Faults when the Right of the Matter is tried: And of this Opinion was the Court after the Matter had been twice debated: But then the Court fell into a Doubt what they ſhould do in this Caſe, for *per Hale* Chief Juſtice, The Court cannot at this Day award a Repleader upon a Writ of Error, if they reverſe the Judgment, as was uſed anciently, for which he cited *Trin.* 8 *E.* 2. *Rot.* 59. *Trin.* 11 *E.* 3. 75. *Trin.* 27 *E.* 3. *Rot.* 21. *Hill.* 33 *E.* 3. *Rot.* 79. where this Court awarded a Repleader upon a Writ of Error after reverſing the Judgment, as the Court of Common Pleas ought to have done before Judgment: But he ſaid, This Courſe had been diſuſed for above theſe hundred Years and could not be practiſed now. Upon which it was moved for the Avowant to reverſe the Judgment and ſet the Matter at large: But then *Hale* Chief Juſtice took two Exceptions to the Avowry. *Firſt*, 'Tis ſaid the Mayor and Commonalty and the Feoffees were ſeiſed, which muſt be intended a joint Seiſin; whereas a Corporation and a Perſon natural cannot be ſeiſed jointly. *Secondly*, The Aſſignments are not pleaded poſitively, but by a *teſtatum exiſtit*, and then if they reverſe this Judgment, perhaps they may give Judgment for the Plaintiff upon his Declaration, for the Faults in the Avowry. *Adjournatur.* *Saunders* for the Plaintiff, *Levinz* for the Avowant.

Judgment reverſed by the King's Bench for miſpleading, they cannot award a Repleader. Vide 40 E. 3. 15. 22 H. 6. 16. Dyer 117, 118. 5 E. 4. 8. 19 E. 4. 1. 1 Lev. 32. 3 Lev. 20. 140. 5 Mod. 11, 102. 1 Salk. 216. 1 Salk. 279. Poſt. 142, 164. Pleading an Indenture *per teſtatum exiſtit*, not good.

* P. 13 * *Tatlow* or *Caſtle* againſt *Batement*.

TROVER; and upon *Non cul'*, Verdict for the Plaintiff; and it was moved in Arreſt of Judgment, That the Action is brought before the Cauſe of Action accrued; for the Converſion is laid at a Day in *Eaſter*

Declaration in *B. R.* refers not to the firſt Day of the Term, but the filing of the Bail.

Eaſter Term, and the Declaration is generally as of *Eaſter* Term, and not at a Day certain (as by *memorand' quod tali, &c.* it may be) and then this muſt relate to the firſt Day of the Term: But *per Cur'*, 'Tis well enough if the Bail was filed after the Cauſe of Action accrued, for here no Action can be depending, nor Declaration delivered, until the Defendant be *in Cuſtodia Mareſcalli*, and that is never till Bail filed, which Filing is at a Day certain: Upon which it was referred to *Liveſay*, the Secondary, to examine when the Bail was filed. *Saunders* for the Defendant.

S. C. 1 Vent. 135. Vide poſt, 141, 176.

Sacheveral againſt *Frogat.*

DEBT for Rent by the Heir, upon a Leaſe from his Anceſtor, rendering Rent to him, his Executors and Aſſigns, during the Term; and upon Demurrer the Queſtion was, If the Heir may maintain an Action of Debt upon this Leaſe? It was argued for the Defendant, That the Action lay not for the Heir, being not mentioned in the Reſervation, and that by the Death of the Leſſor, the Rent determined; for which they cited *Owen* 9. *Richmon* againſt *Butler*, *Latch* 44, 255, 264. *Sury* againſt *Cole*. But on the other Side for the Plaintiff were cited, *Paſch.* 22 *Jac. Rot.* 62. *Sury* againſt *Cole*, *& Hill.* 20. *Jac. Rot.* 177. *Sury* againſt *Brown*, and both adjudged that the Rent continues; contrary to what opinion is reported by *Rolle* and *Latch* in thoſe very Caſes. *Hale* Chief Juſtice, The Rent being reſerved to him, his Executors and Aſſigns, the Rent muſt continue after the Death of the Leſſor, and go to his Heir, upon his apparent Intent to have the Rent continue after his own Death, for otherwiſe it cannot go to his Executors, and this without the Words *during the Term*, otherwiſe where the Reſervation is to * him, or to him and his Aſſigns. Afterwards at another Day the Caſe having been twice argued by *Jones* and *Hunt* for the Plaintiff, and by *Bigland* and *Winnington* for the Defendant, Judgment was given for the Plaintiff.

Anceſtor leaſes, rendering Rent to him and his Executors, the Heir may bring Debt for this Rent. S. C. 2 Saund. 867. 1 Vent. 148, 161. Raym. 213. 2 Keb. 798, 819, 833, 839. Vide Ow. 9. 1 Roll. Abr. 451. Cro. El. 217. Latch. 44. Poſt. 26, 92. 3 Lev. 189.

* P. 14

The

The King againſt *New-College* in *Oxford.*

Mandamus lies not for a Fellow of a College, where the Founder hath appointed one to viſit, and no other. S. C. 1 Keb. 2, 6, 14. 103. 234. 289. 833. 2 Keb. 64. 65. 102. 165. 259. 272. 799. Vide 1 Lev. 23. 65. Raym. 56. 94. 101. 1 Sid. 94. 152. 346. 1 Mod. 82. 83.

A *Mandamus* was granted to reſtore a Fellow of the College, and upon the Return the Court would conſider, whether or no the Writ lay, and after *Hillary* 23, & 24. upon the Return, the Caſe was argued by *Jones* for the Plaintiff, and *Coleman* for the Defendant; the Return ſet forth their Foundation, by which they are obliged to ſtudy ſo many Years, and then take Orders, and that the Maſter and Scholars for enormous Crimes, ſcandalous and dangerous to the College, may expel any Fellow, and that the Biſhop of *Wincheſter* ſhall be Viſitor, and in Caſe of Difference, that all Appeals ſhall be to him and no other; and that this Fellow having committed an Offence enormous, ſcandalous and dangerous to the College, and being ſummoned and convicted thereof by the Maſter, and expelled according to the Statutes of the College, appealed to the Biſhop of *Wincheſter*, who affirmed the firſt Sentence. *Jones* took theſe Exceptions to the Return. *Firſt*, 'Tis not returned what the Offence was, ſo as the Court may judge whether it deſerved Expulſion, *Co.* 5. *Specot*'s Caſe, and they are not impowered to expel for any Cauſe, but for Offences ſcandalous and dangerous to the College, of which this Court is Judge; as was adjudged in this Court, 1655. *Inter Box* and *Woolleſton*. *Secondly*, They have no Power to expel but for enormous Crimes; and this Return is, That he was convict *de Criminibus eormibus*, for *enormibus* without a Daſh, and omitting the Letter *n*, and *eormibus* without the *n*, ſignifies nothing: And as to the Matter he argued the *Mandamus* well lay in this Caſe, and cited 11 *Co.* 68. this Court hath Power to give Remedy by this Writ, where there is no other Remedy for the Thing itſelf by Aſſiſe or Action; and here there is no other Remedy for the Thing itſelf, nothing but an Action upon the Caſe for Damages: The Head of a College may have an Aſſize, a Fellow cannot, unleſs the other Fellows will join with him; now here the Fellows are thoſe who have injured and expelled him, and

and therefore will not join with him for Relief. *And a College is not a Spiritual Corporation, and so no Remedy that way by Appeal to the Ordinary, and although the Founder has given an Appeal to the Bishop of *Winchester*, and to no other, this must not oust the Party injured of his Appeal to the King's Courts for Justice. *Litt. Sect.* 212. A Custom that if Goods be distrained, they shall not be replevied, is void: The same of a Grant: And so if a Man by his Will appoint, That all Differences between Executors and Legatees, shall be referred to, and determined by *J. S.* and no other Person whatsoever; yet this will not oust the Parties of their Right to sue in the King's Court; as for Precedents they cited Dr. *Widdrington*'s Case, and Dr. *Patrick*'s Case in this Court, which see before. *Coleman contra*, Suppose the Return bad upon the Exceptions taken to it, yet if it appear to the Court that the Writ lies not, the Plaintiff cannot have Restitution; and if it appears that the Sentence of the Visitor is conclusive for the Foundation. The Founder may impose what Terms or Conditions he will upon a Creature of his own making; and if they will accept the Thing, they must accept it upon those Conditions which he imposed and obliged it with at its Creation; so it differs from the Cases put of a Replevin, *&c.* for there was a Law in being directing what should be done in those Cases before the Grant, Will, *&c.*—— 2. This is a private Society, that has no Influence upon the public Government of the Realm: *Bagge*'s Case he said was the first Precedent of a *Mandamus* of this Kind; and the Instances there given are all of them touching Offices that concern the Public; and the *Mandamus*'s mentioned in *Ryly*'s *Placita Parliamentaria*, are no more than Letters commendatory; and it does not appear by *Bagge*'s Case, that a *Mandamus* was ever granted for restitution to private Estates; if so, it may as well be granted to restore a Man to his Land or Inheritance. 3. Colleges are Foundations of Bounty and Charity, and every Man may dispose his Bounty or Charity as he pleases.

*P. 15

No Exceptions to the Return to be allowed, where the Court hath not Jurisdiction of the Cause.

Hale and *Twysden*, Colleges are not Spiritual Foundations, but private Societies like Inns of Court: Here, *per Hale*, the Bishop is appointed Visitor and no other. He hath given Sentence in this Matter; What has this Court

Court to do with it? This will cure all the Faults in the Return. The Spiritual Court deprives a Man by Sentence in a Caſe whereof they have Juriſdiction; the Cauſe of this cannot be queſtioned by * Aſſiſe or otherwiſe in any temporal Court, ſo long as the Sentence remains in Force, but the Temporal Courts are bound by it: An Officer in any Temporal Court ſubordinate to this Court, is by Trial and Judgment there deprived of his Office; this Court cannot relieve him by *Mandamus* ſo long as that judgment remains in Force. This College is a Creature made by the Founder, and therefore it would be very hard to allow of Appeals farther than he has appointed them. A *Mandamus* lies to the College, but upon the Return the Court is to judge whether they have Power to meddle in the Caſe or not; and now upon this Return it appears that we have no Power: To all which *Twyſden* and *Moreton* ſeemed to agree, *Rainsford* being ſilent. But the Opinion of the Court appearing *ut ante*, *Jones* deſired no farther Arguments, though aſked that Queſtion by the Court.

* P. 16

Calverly againſt *Plummer.*

Huſband not chargeable for proviſion for his Wife taken without his Conſent. Vide 1 Mod. 9, 124, 126, 141, 142. 1 Vent. 1, 42. 1 Sid. 425. 2 Keb. 554. Litt. Rep. 307. 1 Roll. 351. 1 Salk. 116, 118, 119. Woman comes to proſecute her Huſband for marrying another, he arreſts and

ASSUMPSIT againſt the Defendant for Diet and Lodging for his Wife; and upon *Non Aſſumpſit* at a Trial before *Hale*, in *Middleſex*, the Caſe was: The Huſband left his Wife in the Country, and came and lived in *London* twenty Years, and here married another, for which he was indicted, and his Wife came to *London* to proſecute; upon that he cauſed her to be arreſted, and ſhe was committed to the Plaintiff the Gaoler; who now ſued the Huſband for her Diet and Lodging during the Time ſhe was in Priſon. *Hale* Chief Juſtice, The Huſband is not chargeable without ſome Evidence of his Aſſent; as that he viſited his Wife in Priſon, or by any other Act approved of this Proviſion by the Gaoler. But here the contrary appears, for ſhe came to proſecute him, and he was convicted, and had his Clergy upon her Proſecution; if the Huſband would not allow her Neceſſaries, ſhe ought to have complained in due Courſe of Law for her Maintenance:

tenance: Upon which the Plaintiff seeing the Opinion of the Court, was nonsuit.

impriſons her, he is not bound to pay her Maintenance there.

* *Freake* againſt *Clarke.*

* P. 17

ASSUMPSIT, and declares that he was a Bailiff, and had taken one *J. S.* in Execution, by Virtue of a Warrant upon a *Ca. Sa.* and that the Defendant in Conſideration the Plaintiff would permit *J. S.* to remain at the Houſe of *J. D.* in *Hammerſmith*, till *Friday* next following, that he would ſave him harmleſs from all Reſcous and Eſcapes, and that he permitted him to abide there till *Thurſday* Evening, when he was reſcued, and the Plaintiff compelled thereupon to pay the Debt: After Verdict for the Plaintiff upon *Non Aſſumpſit*, 'twas moved in Arreſt of Judgment by *Levinz*, That this Conſideration was unlawful, being for Eaſe and Favour to one in Execution, that ought to be *in ſalva & arcta Cuſtodia*, 2 *Bulſt.* 213. where a Promiſe in Conſideration the other would ſuffer an Eſcape, is void, and this here is to give him Means and opportunity to eſcape; hereupon the Court at firſt ſtayed the Judgment: But after on the laſt Day of the Term, Judgment was given for the Plaintiff, *Hale* ſaying, He expected he ſhould have been attended with Precedents: But I apprehended upon the firſt Motion he ſaid only, He would conſider the Matter himſelf; but being the laſt Day of the Term, and a long Vacation to follow, he ſaid, He would not delay the Judgment longer, but bid us bring our Writ of Error if we thought fit.

A Promiſe to ſave the Sheriff harmleſs from all Eſcapes, if he would ſuffer one taken *per Ca. Sa.* to ſtay three Days at his Houſe. S. C. 1 Danv. 45. pl. 22. 1 Lev. 98. ſimile. 1 Roll. Rep. 20. pl. 11. Vide 1 Lev. 98, 188. & *ibid.*

* P. 18

* Term. Sanct. Mich.

ANNO

13 Car. II. in Banco Regis.

The King againſt Churchwardens of *Kingſcleere*.

A *Mandamus* for a Sexton, Steward of a Court-Baron, &c.
1 Vent. 143. 153.
1 Keb. 286.
2 Keb. 802.

A *Mandamus* was moved for, the laſt Day of the Term by *George Stroud*, to reſtore the Sexton of the Pariſh, and Day was given till the firſt Day of this Term to ſhew Cauſe to the contrary. And now 'twas moved by *Levinz*, That this Office did not concern the Public, and this Court therefore cannot take Notice of it, as they might of a Conſtable, who is an Officer concerned in the Peace, or of a Church-warden, who has the ordering of the Goods of the Church, or of the Pariſh Clerks, who are to keep the Ornaments of the Church, and to regiſter the Baptiſms and Funerals: But the Sexton is only to ring the Bells and dig the Graves, and is only an Officer at Will, as the *Cowherd* or *Swineherd* of a Village; and *Trin.* 1655. 'twas doubted if it lay for a Schoolmaſter, becauſe private, and not concerning the Public; for then 'twas held, That a *Mandamus* lay only for Officers which concern the Public, as for a Steward of a Leet, not for the Steward of a Court-Baron. But *Hale* Chief Juſtice ſaid, That it lay for the Steward of a Court-Baron, if he be not at Will only, becauſe he is an Officer of Juſtice; and now a Certificate being brought from the Miniſter of the Pariſh, and divers of the Pariſhioners, that the Sexton was an Officer for Life, and received Two-pence

Ante 15.
1 Keb. 5. 549.
2 Keb. 188.

Two-pence a Houſe yearly as Wages, the *Mandamus* was granted; and the ſame Term *'twas granted for another Sexton of a Pariſh without ſuch Certificate. * P. 19

Note, Theſe Caſes were before the Reſolution in *New-College* Caſe before reported, but reſolved after; although in *New-College* Caſe the Writ was granted before, to be conſidered of upon the Return, which was after theſe Caſes. Ante. 14, 15.

Barnes againſt *Gladman* in the Petty Bag in Chancery.

DEBT upon an Obligation, conditioned to perform Covenants in an Indenture of Apprenticeſhip: Defendant pleads Performance. The Plaintiff replies and aſſigns a Breach *& hoc, &c. unde petit judicium & damna ſua ſibi adjudicari.* Defendant demurs, *Quia minus rite concluſit*; for he ought to have ſaid, *Petit judicium & debitum, & damna ſua ſibi adjudicari*; and ſo are all the Precedents in *Co. & Raſt. Entries*, except two in *Coke*'s *Entries*, and thoſe were after Verdict; but this being here ſpecially demurred upon, 'twas much inſiſted to be ill for this Cauſe. But by *Bridgman* Lord Keeper, although it be Form, yet 'tis but unneceſſary Form, for by the praying of Judgment all is included; becauſe when the Court gives Judgment, of Conſequence they give Judgment for the Debt and Damages.

Replication *petit judicium & damna*; omitting *debitum*, good. Vide 1 Lev. 222. Cro. Car. 297. 1 Saund. 98. 99. 4 Inſt. 73.

Jones againſt *Greene*.

TRESPASS for Battery and Impriſonment: The Defendant juſtifies by a Writ out of the King's Bench directed to the Sheriff, and a Warrant thereupon made to him. The Plaintiff demurs ſpecially, becauſe it is not pleaded, That the Writ was delivered to the Sheriff according to the Common Form. To which it was anſwered, That it was not neceſſary to be ſo pleaded; for if in Truth a Writ be ſued out, and he made a Warrant before the Writ come to his Hands, 'tis well,

Sheriff makes a Warrant before the Writ comes to his Hands, well. S. C. 2 Saund. 298, 299. 2 Keb. 607, 838. 844. Vide prox. pag. & 3 Lev. 57. 58, 93.

* P. 20 Vide Hob. 199. Hard. 38. Palm. 287. 2 Inſt. 251. 9 Co. 53, 110. 2 Brownl. 255, Lit. 172, 252.

and the Precedents are both Ways, as * Dr. *Bonham*'s Caſe, 8 *Co. Rep.* and other Caſes; and of this Opinion was *Hale*, and the whole Court, and gave Judgment for the Defendant. *Levinz* Counſel for the Defendant.

256, 260, 264. Cro. Car. 5, 6. Cro. Jac. 133, 221. Moor. 464. 2 Bulſt. 94. 1 Sid. 336.

Dunwell and his Wife againſt *Marſhall.*

Treſpaſs for taking Goods from him, and does not ſay whoſe. 2 Keb. 813. Vide Nelſ. Lutw. 485. 1 Sid. 184; 187. Yelv. 36. Poſt, 156. 2 Show. 395. Stra. 1023. Black. Rep. 980. 1 Term. Rep. 480. Baron and Feme can't join for taking the Baron's Goods from the Wife.

TRESPASS for Battery of his Wife, and for taking from her an Apron and a Pinner. After verdict for the Plaintiff, 'twas moved in Arreſt of Judgment; 1ſt. That it is not alledged in whom was the Property of the Apron and Pinner, and it can't be in the Wife, it may be in a Stranger, and then neither the Huſband nor the Wife has a Cauſe of Action as to them. 2 *Cro.* 46. *Burſer* againſt *Martin.* Treſpaſs *quare equam cepit a perſona*, held ill. 2d. If they were the Goods of the Huſband, the Wife ought not join with the Huſband for them, but the Huſband alone ſhall have the Action. In the 16th of this Reign 'twas ſo adjudged between *Stanton* and his Wife, *&c.* againſt *Hobard:* They brought Treſpaſs for beating the Wife, and tearing a Coat upon the Body of the Wife; and ſo held the Court now, and ſtayed the Judgment. *Levinz* for the Defendant.

Daviſon againſt *Heſlop.*

Bailiff promiſes his Maſter's Creditor to pay him out of the Rent, if he will forbear a Month. 8. C. Raym. 211, 212. 2 Keb. 813. 1 Danv. 31, 11, 53, 32. Vide ante 3. 1 Vent. 121. 152, 154.

ASSUMPSIT, That whereas *Fenwicke* was indebted to the Plaintiff for Arrears of an Annuity of 117*l.* and appointed the Defendant, then his Receiver, to pay it out of the Rents due at *Martlemas* next enſuing; and that the Plaintiff and Defendant accounted, and thereupon it appeared, That 117*l.* was due to him. The Defendant promiſed, That if the Plaintiff would forbear, he would pay it within a Month after. For the Plaintiff 'twas moved in Arreſt of Judgment, That it does not appear that the Defendant received any Rent at *Michaelmas*, and the Appointment was to pay it only

out

out of the Rents due at *Martlemas*; but to this 'twas answered, That it ſhould be ſo intended now, the Defendant having promiſed to pay it upon Forbearance; and ſo held the Court, and gave Judgment for the Plaintiff. *Weſton* * of Counſel for the Defendant, *Levinz* for the Plaintiff.

1 Keb. 866. 1 Sid. 243.

* P. 21

Williams againſt *Fry*.

EJECTMENT, and upon *non cul'* and Special Verdict, the Caſe was this, The Earl of *Newport* being ſeiſed, and having three Sons now living, and two Daughters, one of which Daughters had Iſſue the Wife of the Defendant, deviſed the Meſſuage in Queſtion, called *Newport-Houſe*, in the Pariſh of St. *Martin's Weſtminſter*, to the Wife of the Defendant in Tail: Provided, That if ſhe married without the Conſent of the Earl of *Mancheſter*, and others, or died without Iſſue, then to the Leſſor of the Plaintiff, being then and ſtill an Infant. She not having Notice of the Condition, and being of the Age of Fourteen, married without the Conſent of the Earl of *Mancheſter*, *&c.* to the Defendant *Fry*: He entered, and the Leſſor brought an Ejectment, and the Caſe was argued this and *Hilary* Term following by *Jones* and *Finch* Attorney General, for the Plaintiff, and by *Winnington* and *North* Solicitor General, for the Defendant, and three Points were argued by the Counſel. 1ſt. If this was a Condition, or a conditional Limitation; the Plaintiff is not Heir, and ſo hath no Right to enter; otherwiſe if it be a conditional Limitation. 2d. Be it the one or the other, if Notice thereof ought to have been given to the Deviſee before the Eſtate ſhall be determined? 3d. If Notice were neceſſary, whether the Infancy of both Parties, (for the Leſſor as well as the Deviſee, Wife of the Defendant were both Infants) will alter the Caſe? And afterwards in *Eaſter* Term following, all the Judges concurred in Opinion, and gave Judgment for the Defendant. 1ſt. That in this Caſe the *Proviſo* does not make a Condition, but a conditional Limitation, (although *Proviſo*, and the Words *& ſi* be expreſs Words of Condition) contrary to what is held 10 *Co. Rep.* 40. *b.* and that in reſpect of the

Deviſe in Tail *& ſi &c.* to another, 'tis not a Condition, but a conditional Limitation. *Vide* Mollſoon v. Fitz Gerrald. 3 Mod. Rep. 20. S. C. 3 Keb. 19. Raym. 236, 237. 1 Mod. 86. 306. 1 Vent. 199. 2 Danv. 109. Vide 10 Co. 41. 2 Brownl. 65, 138. 1 Vent. 203. 1 Rol. Ab. 408. 1 Leon, 283. Vide 2 Saik. 570, 571. 1 Vent. 199, 202.

An Infant Purchaſor bound by a Condition

without Notice. Poſt, 106. 152. 1 Lev. 48. 1 Mod. 86, 301. &c. Cro. Eliz. 204. Cro. Car. 158. Cro. Jac. 57, 527, 592. 2 Bulſt. 273. Lat. 9. Brid. 138. Godb. 134. 2 Leon. 114. Vaugh. 271. Cart. 93, 226. 1 Mod. 86.

the Remainder, which is here limited over not to the Heir, but to a Stranger; for it can't be a reaſonable Conſtruction of the Intent of the Deviſor, That if there be a Breach by the Wife of the Defendant, it ſhall forfeit the Eſtate of the Leſſor in Remainder, * but only that it ſhall work a Determination of her own Eſtate, and for this were cited 1 *Rol.* 411. 3 *Co. Wellock* and *Hamond*'s Caſe cited in *Boraſton*'s Caſe, *Ibid.* 20. *b.* 2 *Cro.* 56. *Hill.* 1649. *B. R. Rot.* 758. *Saunders*'s Caſe, 3 *Cro.* 753. *Dyer* 317. *Secondly*, That the Infancy in this Caſe is not material, for the Infant takes by Purchaſe, and is not to have Age; and this is a conditional Limitation expreſs, and Infants are not privileged againſt Conditions in Deed. *Co. Litt.* 233. *Plowd.* 57, 375. *Cro. Condition* 114. *Thirdly*, No Notice of the Condition was neceſſary, and therefore want of Notice will not excuſe in this Caſe, as it did in *Corbet*'s Caſe, 4 *Co.* 2. becauſe the Deviſe here is to a Stranger, and not to the Heir, and the Deviſee might as well take Notice of the Condition, as of the Eſtate deviſed to him, otherwiſe where the Deviſe is to the Heir upon ſuch conditional Limitation, for the Heir might enter upon his general Title as Heir, without Notice of the Will or Condition; here the Defendant had no Title but by the Will, and yet entered. And this Difference was taken and agreed, where a Deviſe is to one upon Condition, and another is concerned, and more privy, he that is moſt privy ſhall give Notice to the other; but where both are equally privy, and equally concerned, as the Leſſor and the Defendant in this Caſe, neither of them is obliged to give Notice. 2 *Cro. Molineux*'s Caſe, 3 *Leon.* 95. *Dyer* 354. *Poph.* 10. 3 *Co.* 72. *Weſtby*'s Caſe, 1 *Cro. Jean* againſt *Thornhill*, 22 *Ed.* 4. 27, 28. 1 *Rol.* 409. *Spring* and *Caſer*'s Caſe: And Judgment was given for the Plaintiff by the whole Court.

* P. 22

Two Perſons equally concerned, neither to give Notice to the other, otherwiſe if one be more privy, or more concerned. Vide 1 Salk. 214. 2 Salk. 457, 472, 476.

Chapman againſt *Gale.*

General Judgment againſt an Executor, entered by Miſtake of the Clerk,

DEBT againſt an Executor, who pleads *plene Adminiſtravit*, and Verdict and Judgment for the Plaintiff, which was entered generally, and thereupon Error was brought, and 'twas aſſigned, That the Judgment ſhould

ſhould have been, *de bonis teſtatoris ſi, &c.* But upon the Affidavit of *Aſtry* the Attorney, That he gave his Clerk Inſtructions to enter it up according to the Plea, and that 'twas a mere Miſtake of the Clerk, it was amended as a Miſpriſion of the Clerk.

amended. Vide Lex Teſtam. 109. 1 Lev. 286. 2 Keb. 810. Vide 1 Rol. 201. C. 205. F.

Raym. 39. 398. 1 Vent. 132. 2 Mod. 316, 317. 1 Sid. 70. 2 Saund. 298. 1 Salk. 49, 50, 51. 3 Mod. 112.

* *Opy* againſt *Feters.* * P. 23

ASSUMPIT upon two Promiſes, the firſt of which was agreed to be good, but the ſecond was that upon *Colloquium* between the Plaintiff and Defendant, about the building of a Houſe, 'twas agreed, that the Plaintiff ſhould build the Defendant a Houſe; and that the Defendant ſhould give him 8*l.* *pro opere & labore ſuo* in building it, and that in Conſideration the Plaintiff promiſed to perform his Part, the Defendant promiſed to perform his Part and that the Plaintiff was always ready *& obtulit* to perform his Part, and the Defendant had not paid. After Verdict for the Plaintiff upon *Non Aſſumpſit*, and intire Damages, 'twas moved in Arreſt of Judgment, That the Declaration was naught, for not having averred the Defendant had hindered him, but only that he was ready *& obtulit*, and though here are mutual Promiſes, yet the Promiſes are only to perform the Agreement, and that is conditional in its ſelf, for in Agreements Executory *pro* makes a Condition precedent, 8 *Co. Ughtread's* Caſe, and this is not like 2 *Cro.* 44. *Prance* againſt *Tringer*, the bare omiſſion of an Averment; but this is a bad Averment, by which it appears, that he hath not done the Thing, and yet it doth not appear that the Defendant hindered him, and the mutual Promiſes do not oblige them to perform the Agreement, other than according to the Agreement, *ſcil.* that the Defendant pay 8*l.* to the other if he built the Houſe: And to this Exception *Hale* ſtrongly inclined, to which *Rainsford* ſeemed to agree. *Twyſden totis viribus contra*, and that the mutual Promiſes had cured all, and there needs no Averment, and that which is here made is but Surpluſage; and the Judgment was ſtayed, and ſo continued till *Trinity* Term; and then being moved again that the *obtulit* after Verdict

Mutual Agreements that the one ſhould build and the other ſhould pay, and declares that he offered to build, without ſaying the other hindered him. S. C. 2 Saund. 350. 1 Vent. 117, 214. 2 Keb. 811, 827. 3 Keb. 45.

Pro makes the Agreement condjtional, and, is as well as a mutual Promiſe That one ſhall pay 8*l.* and the other build, &c. 2 Saund. 352. 10 Co. 42. 2 Leon. 128. 4 Leon. 70. 1 Bulſt. 167. Poph. 198. Godb. 8. 217. Hob. 41. 1 Vent. 177. 178. Averment. Vide 2 Show. 329.

1 Lev. 3, 20. 27, 70, 87, 164, 293, 298.

Verdict ſupplies the want of an Averment, that he was hindered, becauſe if he had not been hindered by the Defendant, the *obtulit* had been in vain, and the Jury would not have found for the Plaintiff, and have given him his Damages; the whole Court agreed to it, and gave Judgment for the Plaintiff: *Hale* and * *Twyſden* ſtill continuing their different Opinions as to the other Matter. *Pollexſen* for the Plaintiff, *Saunders* for the Defendant.

* P. 24

Fiſher againſt *Patten.*

Dutchy Court at *Weſtminſter*, if it can hold Plea by *Engliſh* Bill of Lands in the County Palatine. S. C. 2 Keb. 826.

A PROHIBITION was prayed to the Dutchy Court, becauſe they held Plea by *Engliſh* Bill between Party and Party, of Lands lying in the County Palatine, which ought only to be in the Court of Chancery of the County Palatine, and not here in the Dutchy Court at *Weſtminſter*; which ought to hold Plea only of Lands Parcel of the Dutchy, lying out of the County Palatine; for which was cited *Owen* and *Holt*'s Caſe, *Hob.* 77. On the other Side was cited 4 *Inſt.* 212. and *Rolle*'s *Prohib.* 314. and the ſeveral Patents and Statutes conſtituting the Dutchy were examined: And

Conſtituting a Chancellor, does not conſtitute a Court of Equity. Vide 4 Inſt. 199, 200. More Rep.

Hale Chief Juſtice ſaid, That the Conſtituting of a Chancellor does not of its ſelf conſtitute a Court of Equity; for there is a Chancellor of the Garter, and there was a Chancellor of Augmentations, and yet neither of them ever held any Court of Equity; and he ſaid, That the Statute of *Edward* the Fourth, gave them no Court of Equity, but a Court of Revenue, and how their Court of Equity came to be held does not plainly appear, perhaps it began in the Time of *H.* 5. before the Statute of *E.* 4. But he and *Twyſden* agreeing it might be inconvenient to examine their Power after ſo long Continuance and Practice, as by the Precedents now produced, it appears to be uſed without farther Examination; after it had been two or three Times ſpoke to in this Court, and partly by admiſſion of the Parties, a Prohibition was denied. *Levinz* Counſel for the Plaintiff in the Prohibition, and *Weſton* for the Defendant.

Ridly

* *Ridly* againſt *Egglesfield.* * P. 25

CASE for ſuing in the Admiralty, contrary to the Statutes of *Richard* the Second, and *Henry* the Fourth, and declares, That the Plaintiff libelled there for a Ship and Goods, ſuppoſing them to be taken by Pirates upon the High Sea, and to come afterwards to the Defendant's Hands upon the High Sea; whereas he purchaſed them upon the Land; and upon *Non culp.* the Caſe coming to be tried before *Hale* Chief Juſtice at *Niſi prius*, appeared to be, that the Goods were contraband Goods going to the *Dutch*, in the Time of the late War between the *Engliſh* and them, and taken by a *Scotch* Man of War; and at the Suit of the now Defendant, condemned as Prize by the Admiralty of *Scotland*, and ſold to one *Lutcher* who brought them to Land and ſold them to the Plaintiff in *England:* Upon which *Hale* doubting, cauſed a Juror to be drawn, and directed a Trial at Bar. And now upon the Evidence before *Hale*, *Twyſden* and *Rainsford*, they unanimouſly agreed, That this Caſe was not within the Statute, for the Original Cauſe being Piracy, belongs to the Admiralty, and though the Goods were condemned in the Admiralty of *Scotland*, that alters not the Caſe as to the Juriſdiction of the Court, but that it was pleadable in the Admiralty of *England*, as a Judgment; (and ſo 'twas done in this Caſe, and the Defendant there diſmiſſed, he being Plaintiff in the Admiralty here) but neither that nor the Sale at Land alters the Juriſdiction, the original Matter being Piracy, all which comes in Queſtion again, the Sale at Land being only Matter conſequential, and dependant upon the Piracy. And at laſt by Mediation of the Court, and by Conſent of *Jones*, *Winnington* and *Levinz*, Counſel for the Plaintiff, a Juror was withdrawn, and the Jury paid by both Parties, and no Coſts, and no farther Proſecution to be in the Caſe.

Goods taken by Pirates condemned in *Scotland*, and being brought into *England*, and a Suit for them in the Admiralty after the Sale, this Suit in the Admiralty here is not within the Statute *R.* 2. or *H.* 4.
S. C. 2 Saund. 259.
1 Vent. 173.
2 Keb. 828.
1 Danv. 269.
8. 265, 12.
Vide Raym. 473.
1 Sid. 320.
1 Rol. Abr. 530, 531. 532.
Godb. 26.
March 110.
Hob. 78.
2 Saund. 259, 260.
1 Vent. 32, 174.
3 Mod. 194.
Molloy 449.

Lucy

* P. 26

* *Lucy* againſt *Levington.*

Covenant with the Vendee, his Heirs and Aſſigns, and yet the Executor brings the Action. S. C. 1 Vent. 175, 176. 2 Keb. 831. 2 Danv. 86. pl. 4. 235. p. 1. Vide 1 Roll. Abr. 520. H. 1 And. 55. Palm. 558. 3 Lev. 189. 2 Saund. 371. Ante 13. Poſt, 92, 124.

COVENANT and declares, that *Levington* ſold to *Luke Lucy* the Plaintiff's Teſtator, certain Lands, and covenanted with him, his Heirs and Aſſigns, That he ſhould enjoy the ſame againſt him and Sir *Peter Vanlore*, their Heirs and Aſſigns, and all claiming under them; and aſſigns for Breach, That *Croke* claiming under *Vanlore*, ejected him. The Defendant pleades, That at the Time of the Covenant he was ſeiſed of an indefeaſible Title, and that by a ſubſequent Act of Parliament, reciting, that Sir *Peter Vanlore* had ſettled this Eſtate upon the Lady *Mary Powell*, and that certain Perſons had unduly procured her to levy a Fine, 'twas enacted, That this Fine ſhould be void, and that all Perſons might enter as if no Fine had been levied; and that by Force of this Fine *& non aliter*, the Defendant was ſeiſed, and ſold and made this Covenant; and that after the Act *Croke* claiming by Title derived from the Lady *Mary Powell*, by the Settlement of *Vanlore*, by Virtue of the ſaid Act of Parliament, entered and ouſted him, upon which the Plaintiff demurred: And for the Defendant 'twas argued. *Firſt*, That the Covenant was with *Lucy*, his Heirs and Aſſigns, touching an Eſtate of Inheritance; therefore the Action ought to be brought by the Heir or Aſſignee, whoſe Loſs it is, and not by the Executor. To which 'twas anſwered and reſolved by the Court, *That the Eviction being to the Teſtator*, he cannot have an Heir or Aſſignee of this Land; and ſo the Damages belong to the Executors, though not named in the Covenant, for they repreſent the Perſon of the Teſtator. 2. 'Twas argued, That the Title on the Covenant being good at the Time of the making, and the Title upon which the Evidence depends, created by ſubſequent Act of Parliament; here is no Breach, 9 *Co. Rep.* 106, 107. Dame *Greſham*'s Caſe. To which 'twas anſwered and reſolved by *Hale* and *Rainsford*, That the Act does not make a new Title, but removes the Obſtruction that kept off the old Title; and they ſaid, That doubtleſs Sir *Peter Vanlore*

Covenant againſt *Vanlore*, and all claiming under him, one claims under him by Act of Parliament ſubſequent to the Covenant.

Vanlore was named in the Covenant, for the Purpoſe that they might be ſecured in Caſe this Fine thus unduly obtained ſhould be avoided. But *Twyſden* being of a *contrary Opinion, a Writ of Error was brought immediately. *Sed quid inde venit neſcio.* *Levinz* of Counſel for the Defendant, *Weſton* for the Plaintiff. * P. 27

Lithebury and others againſt *Coriton.*

CASE, for that the one Plaintiff was ſeiſed of a Water Corn-mill, and the others of another, within the ſame Manor, which they have repaired; and that Time out of Mind, *&c.* all Tenants of the Manor, of which the Defendant is one, *molierunt & molire debent*, all the Grain ſpent in their Houſes, at theſe two Mills, or one of them, and that the Defendant, being a Tenant, did grind Corn, ſpent in his Houſe, at another Mill. Upon which the Defendant demurred: 1. Becauſe the Plaintiffs having ſeveral Intereſts can't join in the Action. But by *Hale*, and the whole Court, they may join, for the Damage is intire to both their Mills, by the grinding at this ſtrange Mill, and at neither of their Mills only. But then *Hale* Chief Juſtice, took this Exception to the Declaration, That it is not well laid that he ought to grind at theſe two Mills, or one of them; for it may be, all ought to be ground at one of the Mills, and nothing at the other; and then the Plaintiffs cannot join; but it ſhould be, That whatever Corn is not ground at one Mill, ought to be ground at the other. And *Twyſden* took another Exception, That the Preſcription ought to be for grinding all the Grain which is ground and ſpent in their Houſes; for Grain may be ſpent there which is not ground at all, as Grain for Horſes, Swine, Poultry, *&c.* Upon which, for Expedition, *Saunders* of Counſel for the Plaintiff, prayed a *Nil capiat per billam*; & *habuit.*

Two join in an Action for not grinding at their ſeveral Mills. S. C. 1 Vent. 167. 2 Saund. 115. 2 Keb. 601. 803, 838, 856. 1 Danv. 5, 6. 2 Danv. 428. Vide 2 Vent. 288, 291. 1 Kol. Abr. 31, 29, 12. 1 Vent 297. Dy. 251. 370. 2 Leon. 12. 1 Bulſt. 16. Styl. 156. 203, 298. 2 Salk. 423. 436, 440, 444. 1 Salk. 10.

Preſcription to grind all Grain ſpent in their Houſes, naught. 2 Saund. 177. 1 Lev. 15. 2 Danv. 428. 1 Rol. Abr. 561. Hob. 189. 1 Vent. 168.

Moor. 887. Styl. 421. Hard. 67.

The

* P. 28

* The King againſt *Clapham.*

Reſcous returned as done to the Sheriff, or his Bailiff. Vide 1 Lev. 218 & Poſt. 144.

UPON a Return of Reſcous, the Exception was taken, That the Reſcous was returned to be made to the Bailiff; whereas the Warrant and the Reſcue being made to the Bailiff of the Sheriff, and not the Bailiff of a Franchiſe, the Reſcous ſhould have been returned as done to the Sheriff himſelf, and not to his Bailiff; but by the Court, 'tis good either way.

Hudſon againſt *Benſon* and *Baron.*

Gift to the Uſe of *A.* in Tail, and if he die without Iſſue, to the Uſe that *B.* ſhall have a Rent: *A.* makes a Leaſe for Years, and after ſuffers a Recovery, the contingent Rent is barred, and ſhall not charge the Leaſe. S. C. 1 Mod. 108, 109. 3 Keb. 274, 287, 292.

ERROR of a Judgment given in the County Palatine of *Lancaſter*, before *Wylde* Juſtice there, in a Replevin, wherein the Defendants made Conuſance as Bailiffs to *Anne Morely*; for that *Rowland Morely* being ſeiſed 23 *Jan.* 1616. enfeoffed *Davenport*, and others, to the Uſe of himſelf, and the Heirs males of his Body, Remainder in Tail to divers others, Remainder to his own right Heirs. Provided, That if *Rowland* and *Edward* his Son, and the Lady *Elizabeth Morely* ſhall all happen to die, and no Iſſue male of *Rowland*, that then the ſaid *Anne Morely* ſhall have a Rent-charge of 200l. until ſhe receive 2000l. with all Charges for recovering thereof out of the Profits. The firſt Payment to commence at the firſt Day of Payment which ſhall happen firſt after all the ſaid Contingents; and then ſhews, That the ſaid Contingents are all paſſed, by which ſhe was ſeiſed for her Life; and for Rent arrear, they make Conuſance, *ſcil* for 10l. Part of the Rent for Half a Year. The Plaintiff in Bar of the Avowry pleads, That *Edward Morely*, the laſt Iſſue male of *Rowland*, levied a Fine, and ſuffered a Recovery of the Land. To which Bar the Defendant replied, That before the Fine and Recovery, the ſaid *Edward* made a Leaſe for 1000 Years to *B.* and *C.* which yet continues; upon which the Plaintiff demurs; and *Wylde* adjourned the Caſe to be argued at his Chamber at *London*; where 'twas argued before him by *Finch* Attorney General, and *Pemberton* for the Plaintiff,

Plaintiff, and by *North* Solicitor General, and *Levinz* for the Defendant, and two Points were made:— * P. 29
1. If this Contingent were barred by the Recovery?— 2. If the Leaſe for 1000 Years remained liable to the Rent, admitting it barred as to the Remainders intailed upon the Eſtate? And for the Avowant 'twas ſaid, That the Recovery can't bar this contingent Uſe, which was not *in eſſe* when the Recovery was ſuffered, and therefore no Recompence in Value, the Reaſon for which Common Recoveries do bar, can go to this.— 3 *Co. Cuppledike's* Caſe, and therefore it is not barrable. 3 *Cro. Pell* againſt *Brown*. *Vide Mo. Pl.* 201. a Power in Executors to ſell after an Eſtate-tail determined; and 2 *Cro.* 127, 792. a Rent reſerved upon a Gift in Tail, is not barred by a Recovery: As to *Capell's* Caſe, 1 *Co. Rep.* the Rent was barred, becauſe it iſſued out of the Remainder in Tail, and that was barred by the Recovery: But the Rent here is as it were a Rent-charge upon the Land, created by him that had the whole Fee in him, which is like *Whitlock's* Caſe, 8 *Co. Rep.* where a Charge or Leaſe made by Virtue of a Power upon a Settlement, covers all the Eſtates, like a precedent Grant. But to this 'twas anſwered and reſolved by *Wylde*, 1. That the Recovery bars this Rent, becauſe it has barred all the Eſtates chargeable with the Rent, though it be admitted to ariſe out of the Seiſin of the Feoffees, according to *Whitlock's* Caſe. But 'twas agreed, That if it had been created by a Grant precedent to the Feoffment, it had not been barred by the Recovery: And 'twas ſaid, That *Capell's* Caſe ruled the Caſe in Queſtion; and that all the Objections are made in *Capell's* Caſe, which can be made to this Caſe: *viz.* 1. That the Rent there was charged upon the Remainders, as it is in this Caſe.— 2. That Common Recoveries would be to no Purpoſe, if they do not bar Rents iſſuing out of Eſtates in Tail, as well as the Eſtates themſelves. 3. The Grantee of a Rent-charge can't falſify a Recovery of the Land. 4. 'Twas objected in *Capell's* Caſe, as 'tis here, That the Recompence in Value can't extend to the Rent. To which 'twas anſwered, That the true Reaſon of Common Recoveries is not the Recompence in Value, but that they were Common Conveyances. 9 *Co. Rep. Beamond's* Caſe. Baron and Feme Tenants in Tail, Baron

The Reaſon why Intails are barred by Common Recovery. Poſt. 55. 2 Salk. 568. 2 Lutw. 1548.

Baron levies a Fine and dies, the Feme ſurvives, and ſuffers Common Recovery, this is a good Bar, and yet no Recompence in Value can go to the Eſtate-tail, for that was diſturbed by the Fine before. And as to the ſecond 'twas argued and reſolved, That the Land can't
* P. 30 be chargeable during * the Term for 1000 Years, becauſe 'tis only derived out of the Eſtate-tail in *Edward*, which is ſpent and determined, and before the End and Determination of the ſaid Eſtate this Charge was not to ariſe. *Note*, No Notice was taken that this Fine and Recovery were both of them before the Uſe of the Rent aroſe, by which perhaps the Privity and Eſtate being altered and deſtroyed before the Contingent happened, the Contingency could never ariſe, and ſo is barred. And after Deliberation, the Judge gave Judgment againſt the Avowant; upon which this Writ of Error was brought, and *Poſtea Paſch*, 26 *Car.* 2. *B. R.* the ſaid Points were argued again by *Levinz* for the Plaintiff, in the Writ of Error, and by *Heneage Finch* the late Attorney General now Lord Keeper, and the Judgment was affirmed by *Hale*, *& Cur'*, who concurred in both Points with the Judgment of *Wylde*, and all agreed *Capell*'s Caſe, and the Reaſons of it. And *Hale* ſaid, *The Recompence of the Value is the Reaſon of the Bar by Common Recoveries, as to the Iſſue in Tail; but not the Reaſon why it bars as to him in Reverſion or Remainder*; but the Reaſon in this Caſe is, becauſe *the Recoveror in Suppoſition of Law is in of the Eſtate-tail, and that in Judgment of Law has ſtill Continuance:* As at Common Law the Donee *poſt prolem ſuſcitatam*, might have aliened and barred the Donor, and a Common Recovery is as it were a Conveyance excepted out of the Statute *de donis*, and the Recoveror is in of the Eſtate which the Donee had, but the Iſſue in Tail is barred to claim it, in reſpect of a ſuppoſed Recompence by the Recovery; and ſo the Eſtate-tail having in Judgment of Law Continuance, no Charge upon the Reverſion or Remainder can take place, and that is the Reaſon of *Capell*'s Caſe, why the Charge of him in Remainder can't take Place after a Recovery ſuffered by the Tenant in Tail. And he agreed *White* and *Geriſh*'s Caſe, in 3 *Cro.* that a Rent reſerved upon a Gift in Tail is not barred, but remains as a collateral Charge upon the Land, diſtrainable of Common Right; but

Common Recoveries bar Remainders, &c. not upon the Reaſon of a Recompence, as they do the Iſſue in Tail. Poſt. 55. 2 Salk. 586. 2 Lutw. 1548. 2 Mod. 131, 132.

Eſtate-tail, Remainder for Years, Recovery bars both. See 1 Mod. 110, 111.

but if in ſuch Caſe there be a Condition of Re-entry, that is barred. *Twyſden* doubted, if the Rent were not barred in *Geriſh*'s Caſe; but *Hale tatis viribus* held, That it was not barred; and *Hale* ſaid, That about the 9th of *Eliz.* it was a Doubt, whether if Tenant in Tail, Remainder for Years, and Tenant in Tail ſuffer a Recovery, the Leaſe for Years be barred; becauſe being a Chattel, no Recompence of Value could go to it? But he ſaid, That conſtant Experience hath allowed, * that ſuch Leaſe is barred. Then two Exceptions were taken to the Pleading. *Firſt*, Becauſe it is *quædam finalis concordia facto fuit, & poſtea conceſſum & concordatum*; whereas the uſual Form is *quidam finis ſe levavit*, which includes all; but when they would plead by Parts they ought to ſhew all, and perhaps no King's Silver was paid. But this Exception was over-ruled, for the ancient Courſe of Pleading was in this Manner. *Secondly*, The Recovery is pleaded, but no Execution thereof, and then the Eſtate-Tail remains till it be barred by Execution ſued out. But this was alſo over-ruled, for if no Execution be ſued out, then the Recovery is to the Uſe of him againſt whom it was had, ſince no other Uſe appears: But *Quære* of this Reaſon, For before Execution, how can any Uſe of the Recovery ariſe?

Rent reſerved upon a Gift in Tail, not barred by Recovery, but a Condition of Re-entry is.

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Several ways to plead a Fine. Vide 3 Lev. 330.

Common Recovery pleaded without Execution. Vide Winch Entr. 1128, 1168. Co. Entr. 702. 2 Cro. 453. 3 Co. 58. b. 1 Co. 1. 1 Jo. 10. 140, 146.

2 Mod. 70. 2 Lutw. 1548. 4 Mod. 261, 263. Parliament Caſes.

Term.

Term. Sanct. Hill.

ANNO

23 & 24 Car. II. in Banco Regis.

The King againſt *Harwood.*

Cuſtom of *London*, for City Orphans to be in the Cuſtody of the Mayor, &c.
S. C. 1 Mod. 77, & 79.
1 Vent. 178, 180.
1 Sid. 250.
Raym. 116.
Vide 1 Lev. 162.
2 Danv. 312.
Benl. 3.
And Fine and Impriſonment for marrying without their Aſſent, &c.
Vide 1 Sid. 250.
1 Lev. 162.
1 Chan. Rep. 26.

UPON a *Habeas Corpus* to the Keeper of *Newgate*, the Return was, That the Court of Aldermen in *London*, are by the Cuſtom of *London*, Guardians of all City Orphans; and that if any Man marry a City Orphan under the Age of twenty-one, without their Conſent, they may puniſh him by Fine and Impriſonment; and that *Harwood* married Mrs. *Offley*, a City Orphan, having a Portion of 800 *l.* without their Conſent, for which they fined him 40 l. and becauſe he refuſed to pay, committed him to *Newgate*. To which Return Exceptions are now taken by *Weſton* and *Offley*; *Firſt*, That it is not returned in what Place he married her, and the Cuſtom cannot extend to Places out of the City, neither can it be an Offence to marry a City Orphan out of the City, for in the Country one cannot know a City Orphan from another, nor know the Cuſtoms of the City. *Secondly*, This is a Power to fine and impriſon, without excepting a reaſonable Excuſe, which may be ſhewn to the contrary. *Thirdly*, It is ſaid he married her without their Conſent; but it is not ſaid he took her *extra cuſtodiam ſuam*. *Fourthly*, It is not ſaid he refuſed to pay the Fine, not ſhewing a reaſonable Cauſe to the contrary. To which it was anſwered

anſwered by *Finch* Attorney General, and reſolved by *Hale* and the whole Court, that their Power would be in vain, if the Cuſtom ſhould not extend to Marriages out of the City, for then it were but drawing a City Orphan to *Iſlington*, and marrying her there, and ſo eſcape Puniſhment; and that every one ought to take Notice whom he marries, and he might have been informed by the Orphan herſelf, though ſhe were in the Country, and beſides no one was bound * to give him Notice. And as to the ſecond and fourth Exception, it ſhall be intended he could not ſhew a reaſonable Cauſe to the contrary. *Thirdly*, She continued in the Cuſtody of the Aldermen, whereſoever ſhe was, and then the marrying her without their Conſent was taking her *extra cuſtodiam ſuam*.

Marrying an Orphan without the City, finable within it.

* P. 33

The Mercers and Ironmongers of *Cheſter* againſt *Radford*.

THEY ſued the Defendant in the City-Court of *Cheſter*, for uſing the Trade of a Linen-Draper there, which (as they alledged) no one ought but Citizens and Freemen: He exhibited his Bill in the Exchequer-Court of Equity there to have the Matter tried in an indifferent County, becauſe the Mayor and Aldermen are both Parties and Judges: The Exchequer hereupon granted an Injunction and appointed the Trial to be in the County of *Cheſter* at large. Upon this the Mercers and Ironmongers prayed a Prohibition, which was denied; for the Chancery here directs Trials for Lands to be in indifferent Counties; as in *Moſely* and *Maynard*'s Caſe, where upon a Writ for Land in *Lancaſhire*, the Chancery directed the Trial to be by a Jury of *Hertford*, at the Exchequer-Bar: And in *Cole* and *Green*'s Caſe, a Truſt for Houſes in *London*, 'twas tried at this Bar by a *Middleſex* Jury.

The Court of Equity at *Cheſter*, grants a Trial in the County at large.

1 Chan. Caſes 253.

1 Lev. 309, 311.
2 Saund. 252, to 259.
1 Mod. 94.

Woolnough and his Wife againſt *Virdon.*

Trin. 22. Rot. 844.

Aſſumpſit to convey his whole Eſtate. 8. C. 2 Keb. 708. Vide 1 Lev. 179. 204. 3 Lev. 150. 1 Vent. 211, 212. Hard 366. 2 Keb. 81. 82. 182. 1 Roll. Abr. 22. pl. 22.

ASSUMPSIT and declares, That in Conſideration that the Plaintiff and his Wife at the Defendant's Requeſt, would convey to *Charles Lucy*, Couſin and Heir of *Matthew Lucy*, their Eſtate in certain Lands in *Higham*, (which were the Lands of the ſaid *Matthew*) in ſuch Manner as the ſaid *Charles* ſhould appoint, the Defendant promiſed to pay them 50 l. And that whereas the Plaintiffs at the Defendant's Requeſt, had promiſed to convey the ſaid Tenements to the ſaid *Charles*, by ſuch ways as he ſhould appoint, the Defendant promiſed to pay them another Sum of 50 l. and then alledges that they were always ready to convey, but *Charles* never * requeſted. The Defendant pleads, That at that Time the Plaintiffs nor either of them had any Eſtate in the ſaid Lands. Upon this the Plaintiffs demurred; and entered a *Nolle proſequi* as to the ſecond Promiſe, and had Judgment for the firſt: Hereupon Error was brought and aſſigned, that there was no Conſideration; the Plaintiffs having no Eſtate, as is now confeſſed by the Demurrer. But by all the Court, this is well, for the Bargain was for ſuch Eſtate as they had, and they might have a Right extinguiſhable by Releaſe, although they had no Eſtate; and ſo they affirmed the Judgment.

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Plea that he had no Eſtate, naught; for he may have a Right extinguiſhable.

Nota, No Notice was taken that the *Nolle proſequi* was entered upon the one *Aſſumpſit* before Judgment was given upon the other; but that ſeems well enough upon the Authority of 1 *Cro. Walſh* and *Biſhop.*

Cro. Car. 239.

Parſons againſt *Pierce.*

Feme ſole makes a Feoffment, *deins* view, and directs him to enter, they intermarry, and

EJECTMENT; upon a Special Verdict the Caſe was: A Feme ſole made a Charter of Feoffment to *J. S.* and within the View directed him to enter, without other Livery. They intermarried before he entered, and after he entered: And if the Livery was made

made good by this Entry after Marriage, or thereby countermanded? was the Queſtion. And it was adjudged that the Feoffment was made good by this Entry after Marriage, and not countermanded by the Marriage: And it is not like *Force* and *Hemlock's* Caſe, 4 *Co. Rep.* 60. where a Feme deviſes Land to a Man, and they intermarry, and then ſhe dies, there indeed the Marriage is a Revocation of the Deviſe; for otherwiſe the Deviſe would be irrevocable, which is contrary to the Nature of the Thing: But this is like the Caſe there cited, A Feme ſole grants a Reverſion and marries the Grantee before Attornment, yet the Attornment by the Tenant to the Grantee after the Marriage, is good, and not countermanded by the Marriage, becauſe 'tis for the Benefit of the Huſband, and the Grant ſhall be taken moſt ſtrongly againſt the Grantor. Otherwiſe perhaps in that Caſe if ſhe had married a Stranger, and ſo perhaps here.

then he enters.
S. C. 1 Mod. 91.
1 Vent. 186.
2 Keb. 872. 882.
See 4 Co. 68. Co. Litt. 351.
1 Cro. 284.
Q. 1 Vent. 186.

* *Zouch* againſt *Claye.* * P. 35

IN Debt upon an Obligation, the Caſe was thus: *A.* and *B.* delivered the Bond to *C.* and after, by the Conſent of the Parties, the Name and Addition of *D.* was interlined, and he alſo ſealed the Obligation and delivered it. And if the Obligation by this Alteration was made void againſt *A.* and *B.* or not, was the Queſtion? But by *Hale*, and the whole Court adjudged, That it was not; and that 'tis the Obligation of all three, and ſo is *Moor. Rep. pl.* 738. although 3 *Cro.* 626. was before adjudged contrary. But as the Caſe is in 3 *Cro.* the Obligation was altered only by Conſent of the Obligors, in the Abſence of the Obligee, and without his Notice, though to his Uſe. But here 'tis by Conſent of all Parties.

A. and *B.* ſeal, &c. Obligation to *C.* and after by Conſent *D.* is added, and he ſeals, &c.
1 Vent. 185.
2 Keb. 872.
Vide 1 Rol. Rep. 39, 40.
2 Rol. Rep. 29, 30.
11 Co. 27, 28.
Cro. Car. 399.
Mo. 619.

Lloyd againſt *Brocking.*

A Right of Entry will preſerve a contingent Remainder. S. C. 2 Saund. 382. 1 Mod. 92. 1 Vent. 188. 189. 2 Keb. 872. 881.

THOMAS Bradſhaw, Tenant for Life, Remainder to *Peter Bradſhaw* for Life, Remainder to the firſt and tenth Sons of *Peter* in Tail, the Remainder to the right Heirs of *Edward Bradſhaw*. *Peter* had Iſſue a Son, and then *Peter* and *Edward* levied a Fine to *Thomas Bradſhaw*, (the Son of *Peter* being then alive) *Thomas* then made a Feoffment in Fee, and after that *Peter* had Iſſue a ſecond Son, and after the firſt Son died; all which Matter appeared upon a Special Verdict, in Ejectment upon a Will by which the Settlement was made: And the ſingle Point in Queſtion was, Whether by the Feoffment of *Thomas Bradſhaw*, the contingent Remainder to the ſecond Son was deſtroyed, he being unborn at the Time of the Feoffment? And 'twas by *Hale*, and the whole Court adjudged, not deſtroyed, but preſerved by the Right of Remainder, which was in the firſt Son, till the Birth of the ſecond Son.

* P. 36

* The Biſhop of *Exeter* againſt *Starr.*

If the Biſhop for Caution can take an Obligation to himſelf, or to him and his Commiſſary, or to the King. S. C. Raym. 226. 2 Keb. 814. 436, 848. 873. Vide 6 Mod. 71.

DEBT upon an Obligation taken for Caution upon an Excommunication and upon Demurrer, if the Obligation was good or bad, was the Queſtion? And 'twas argued by *Jones* for the Defendant, and by *Maſters* for the Plaintiff. Three Objections were made againſt the Bond; 1. That no Obligation *omnino* ſhould be taken for Caution, for it muſt go to the Executors of the Biſhop. *F. N. B.* 65. *Regiſt.* 66, 67. But *cautio pignoratitia* is good, for the Goods remain in Truſt to compel Obedience to the Church. 2. If the Biſhop can take Obligations, yet they ought not to be taken to the Biſhop and his Commiſſary, or Chancellor, as this is, but to the Biſhop only. 1 *Bulſt.* 125. 3. If any Obligation may be taken, it muſt be taken in the Name of the King, and not of the Biſhop, as all Recognizances are taken in the King's Courts. On the other Side 'twas ſaid, That Caution is a Term of the Canon

Canon Law, and they know beſt what it means. That they have three Sorts of Cautions; 1. *Juratory*, by Oath, which is in ſmaller Offences, and when the Party can't give other Security, whereby the Party makes Oath to perform the Sentence of the Court. 2. *Fidejuſſory*, by Obligation and Sureties. 3. *Pignoratitia*, the pledging of Goods, Plate, *&c.* All which are good: More eſpecially this by Obligation, being more for the Eaſe of the Party, and the making thereof is his own Act. And as to that which is ſaid, 1 *Bulſt.* 122. tis but an *obiter* Opinion, and no Point in the Caſe. *Hale* Chief Juſtice, doubted if the Bond were good. *Wylde* held it to be good. And being moved again in *Baſter* Term following, the Court would not proceed farther in the Caſe, becauſe the Excommunication and Offence were pardoned by the General Pardon. But then *Hale* Chief Juſtice ſaid, That upon a Writ *de cautione admittenda*, the Biſhop may take an Obligation, becauſe the Writ enables him ſo to do; but otherwiſe he cannot. And now *Wylde* alſo held, That the Biſhop could not take the Obligation in his own Name, and ſo make the Forfeiture due to himſelf, when it ſhould be to the King. 1 *Rol. Rep.* 110.

* *Enbrin* againſt *Mompeſſon.* * P. 37

A DMINISTRATOR *de bonis durante minore J. S.* obtains Judgment, and in a *Scire Facias* againſt the Bail 'twas pleaded, That *J. S.* is now of full Age: Whereupon the Plaintiff demurred, and 'twas adjudged no Plea, for the Recognizance is to the Plaintiff himſelf by Name, though he be Adminiſtrator *durante minore ætate tantum*, and the Infant's coming of Age does not hinder the Plaintiff from ſuing a *Scire Facias* againſt the Bail. But by *Hale*, If after the Infant come of Age he had ſued out Execution upon the principal Judgment, it might have been a Queſtion, whether that ought to be ſued out by him, or by the Infant?

Adminiſtrator *durante minore* ſues a *Sci. Fa.* againſt the Bail, the Infant being come of Age. Vide 1 Rol. Ab. 526, 910. 911. 5 Co. 29. Ow. 35. Cro. Car. 516. Cro. Eliz. 602. 718. Mo. 462. Godb. 104. 1 Mod. 174 1 Sid. 57.

Proctor

Proctor againſt *Newton.*

Execution by a Stranger upon prior Title. well pleaded without ſhewing what was the Title.
S. C. 1 Vent. 184.
2 Keb. 878.
3 Keb. 41.
2 Danv. 50, 14.
2 Saund. 178, 179.
Vide 4 Co. 80.
Aleyn 19.
Noy 50.
Yelv. 30.
Styl. 67.

DEBT upon an Obligation to perform Covenants. The Defendant pleaded the Covenants, which were upon a Sale of Land to the Plaintiff, that the Plaintiff ſhould enjoy the Land againſt *A.* and *B.* and pleads Performance generally. The Plaintiff replies, That *A.* and *B. habentes jus virtute tituli eis inde fact'*, before the Conveyance and Covenant, entered upon him and ouſted him; upon which the Defendant demurred, ſuppoſing the Breach too general, not ſhewing by whom, and by what Title they entered: But the Plaintiff being a Stranger to the Title of *A.* and *B. Hale* held it to be well enough, *dubitante Twyſden, & adjournatur.* But in *Trinity* Term after, 'twas adjudged for the Plaintiff. *Levinz* Counſel for the Plaintiff, *Winnington* for the Defendant.

Mo. 185, 861. 1 Vent. 184. 2 Mod. 213. Cro. Car. 1, 5, Cro. Jac. 315, 425, 444. Cro. Eliz. 437, 914, 916, 927. 2 Vent. 61, 62. 1 Lev. 301. 2 Lev. 194. 3 Lev. 325. 1 Mod. 101. 3 Mod. 135. 1 Stra. 400. 1 Term. Rep. 671.

* P. 38

* *Baddington* againſt *Freeman.*

Suit againſt Baron and Feme, being an Infant, ſhe muſt appear by Guardian.
Vide 1 Lev. 299, 300.
2 Saund. 212, 213.
1 Vent. 40, 54.
1 Keb. 248.
2 Keb. 28, 878.
3 Mod. 396, 298.
1 Mod. 82, 72, 296.
1 Vent. 102.
1 Sid. 889.
Error in Fact.

ASSUMPSIT againſt Baron and Feme, upon a Contract for Wares, by the Feme *dum ſola.* Verdict and Judgment was for the Plaintiff upon Iſſue *Non Aſſumpſit* in the Common Pleas; and thereupon in Error here 'twas aſſigned, That the Wife was within Age, and appeared by Attorney, whereas it ſhould have been by Guardian. The Defendant pleaded *in nullo eſt erratum*, which is a Demurrer, ſuppoſing that ſhe joining with her Huſband, ought not to be ſued by Guardian, but by Attorney, as it is. But *Hale* and *Twyſden* held it to be Error, and confeſſed by the Demurrer, it being Error in Fact. But becauſe this was only aſſigned for Delay, the Plaintiff was ruled to waive his Demurrer, and take Iſſue upon the Nonage. *Vide Townſend's Tables*, 205. Two Precedents, where the Wife in ſuch Caſe appeared by Guardian.

Hopkins

Hopkins and *Prior* againſt *Weiggleſworth.*

TRESPASS, and Judgment againſt the Defendant, now Plaintiff in Error in the Exchequer Chamber, and aſſigns for Error the Death of one Defendant before the firſt Judgment. The Defendant in Error pleads *in nullo eſt erratum*, which confeſſes Error in Fact; but the Court affirmed the Judgment, for the Court of Exchequer-Chamber hath nothing to do with Errors in Fact. For the Court of King's Bench had Power to examine Errors in Fact in their own Judgments before the Statute, and therefore the Statute does not extend to this Caſe, but only to ſuch Caſes, as had no other Remedy but in Parliament. Whereupon the Plaintiffs brought a Writ of Error, *coram vobis reſident' in Banco Regis*, and aſſigned the ſame Error, and entered it upon the ſame Roll. And *Hale* Chief Juſtice held, This Writ does not lie here, for this muſt be * brought upon and recite the whole Proceedings in the Exchequer Chamber.

Error in Fact aſſigned in the Exchequer-Chamber, they affirm the Judgment, becauſe they cannot try Errors in Fact. S. C. 3 Keb. Vide 6 Mod. Error in Fact aſſigned in the Exchequer Chamber, and Judgment affirmed, Error in the King's Bench, how. Stra. 606, 690.

* P. 39.

Pureſoy againſt *Rogers.*

EJECTMENT, and upon Not guilty and Special Verdict. Feme Tenant for Life, Remainder to her firſt Son, ſhe married, and before a Son born, he in Reverſion in Fee, conveyed the Inheritance to Baron and Feme; after ſhe had Iſſue a Son, and died. *Et per Curiam*, Though if ſhe had ſurvived her Huſband, ſhe might have avoided and waived the Eſtate taken by the Fine, yet the contingent Remainder to the Son is utterly deſtroyed, he being not in *eſſe* when the Contingency happened. For the Baron and Feme took by Intireties. *Co. Litt. Sect.* 673. and therefore the Eſtate for Life of the Feme was merged before the Contingent happened, and the Poſſibility which the Feme had of waiving the Inheritance, and reviving her Eſtate for Life, will not preſerve it: For contingent Eſtates, if the particular Eſtate that ſupports them continue not *in Eſſe* when the Contingent happens, never can ariſe, be the Determination thereof by Surrender, Merger, Feoffment or any other way: And Judgment was given accordingly

Feme covert Tenant for Life, Remainder to her firſt Son, ſhe and her Huſband accept a Fine of the Fee before a Son born, the Remainder to the Son is deſtroyed. S. C. 3 Keb. 11. 2 Saund. 380. 2 Danv. 520. S. 17. A contingent Eſtate, if it veſt not during the particular Eſtate, is deſtroyed. Vide 1 Lev. 11, 135. 2 Saund. 380

381.
3 Lev. 432. 434.
2 Mod. 9, 289.
Raym. 82.
2 Saund. 386.

accordingly for the Defendant; for which were cited 1 *Cro. Biggot* againſt *Smith*, 2 *Cro. Wood* againſt *Ingerſole*, *More pl.* 459. *Finch, Co. Litt.* 28. *a. Saunders*, (afterwards Chief Juſtice *de B. R.*) for the Plaintiff, and *Holt*, alſo afterwards Chief Juſtice of the King's Bench, for the Defendant.

Seaman againſt *Dee*, Adminiſtrator of *Everad.*

* P. 40
Attorney ſues by Original, he muſt declare as others, and not upon Privilege.
8. C. 2 Keb. 860, 879.
3 Keb. 15.
1 Vent. 198. 199.
Vide 1 Sid. 429.
1 Lev. 261.
3 Lev. 311.
Executor ſuffers Judgment for Principal and Intereſt incurred in his Time, this Judgment is not pleadable without ſhewing that he wanted Aſſets to pay the Debt.
Vide 1 Lev. 132, 255, 256.
Poſt. 110, 189, 190.

ASSUMPSIT by the Plaintiff an Attorney of this Court, by Original, and declares *in propria perſona* upon his Privilege *ſecundum conſuetudinem Curiæ*. The Defendant pleads a Recognizance unſatisfied, and alſo a Judgment in Debt for Five thouſand Pounds, upon a Goldſmith's Note, to be paid * with Intereſt upon demand; and this not being paid till ſuch a Time, and the Intereſt thereby amounting to 1700 l. Judgment was thereupon had againſt him for 7600 l. and that he had not Aſſets *ultra* 40 l. chargeable to this Recognizance and Judgment: And upon Demurrer Judgment was given for the Plaintiff by *Hale & totam Curiam*. *Firſt*, The Declaration is naught, declaring in this manner by Privilege upon Original, for the Privilege of Attorneys is in Suits by Bill; but when they ſue by Original, they muſt declare as others do in common Form. But this is only Form, and cured by the general Demurrer. *Secondly*, The Plea is ill in pleading a Judgment for Intereſt, it is a *Devaſtavit* to let that to grow arrear, and then ſuffer a Judgment for it; and want of Aſſets to pay the Debt before Intereſt incurred by the Adminiſtrator, ſhall not now be intended, it not being expreſly ſo pleaded.

Vide 1 Roll. Abr. 931. Goldſb. 142. Godb. 29. Keilw. 59. Mo. 299, 358. 678, 752. Cro. Car. 490, 519, 603. 3 Leon. 143, 241. Hob. 265. Cro. El. 102. 216. 2 Leon. 188. Style 56. 1 Lev. 147, 245, 255. 1 Vent. 315, 321. 1 Mod. 175. 2 Lev. 110, 133, 145. 189. 209. 1 Sid. 337. 2 Sid. 102. Cart. 2. 1 Lutw. 670. 3 Lev. 113, 115. 1 Saund. 216. 2 Show. 55, 56.

Term.

Termino Paſchæ,

ANNO

24 Car. II. in Banco Regis.

Newman againſt *Kingerby*.

A PROHIBITION was prayed and granted upon a Suit in the Eccleſiaſtical Court by a Parſon, for calling him *Fool, Aſs and Gooſe*, for theſe are only Words of heat, and do not touch him in his Profeſſion.

Prohibition to a Suit for *Fool, Aſs and Gooſe* of a Parſon. S. C. 3 Keb. 28.

Pinfold againſt the *Eaſt-India* Company, *Northey*, *J. S.* and *Willoughby*, by *Engliſh* Bill in the Exchequer-Chamber.

NORTHEY and *J. S.* ſeverally ſued *Bateman* to Outlawry before Judgment; and *Bateman* having 500 l. Stock in the *Eaſt India* Company, and that found by Inquiſition, the King made Seiſure thereupon, and then granted it to *Northey* and *J. S.* in Satisfaction for their Debts, which were by Obligation, with Power to ſue in their own Names. The Company refuſing to transfer the Stock to them, they brought a Bill in the Exchequer againſt the Company; upon which it was decreed, That the Company ſhould transfer the Stock to *Northey* and *J. S.* which accordingly they did upon a Writ of Execution of this Decree, and entered their Names in their Books, and ſtruck out the Name of *Bateman*. *J. S.* aſſigned his Intereſt to *Willoughby*, and he was by the Company entered in their Books for his

Merchant having Stock in the *Eaſt-India* Company, outlawed, the King aſſigns the Stock to a Creditor, the Outlawry is reverſed. He is again outlawed at another's Suit, to whom the King grants the Eſtate. &c. Q. Who ſhall have it. Vide 1 Lev. 8, & 23. 1 Vent. 193.

2 Hawk. P. C. 656.
2 Bac. Abr. 232, 370.
2 Cromp. Pract. 61.

his Share. Afterwards *Bateman* reverſed the Outlawry, and *Northey* went on with his Action againſt him, and obtained Judgment, but no Execution. The King granted to *Bateman* a Reſtitution *de omnibus quibus nobis non eſt reſponſum.* * Then *Pinfold* having a Debt due to him by *Bateman* upon Obligation, ſued him thereupon, and had Judgment, and outlawed him after Judgment. And then the King granted this 500l. Stock to *Pinfold*, as he had before granted it to *Northey* and *J. S.* and the Company refuſing to admit him Creditor, he brought his Bill againſt the Company, *Northey*, *J. S.* and *Willoughby*, by which and upon a croſs Bill, and by the Anſwers and Depoſitions, this whole Matter was diſcloſed. And the Court held and decreed, *Firſt*, That the Stock was well transferred by the firſt Grant which the King made to *Northey* and *J. S.* and was not reſtored by that Grant which the King made *de omnibus de quibus nobis non eſt reſponſum*. For the King's Grant was executed by the Transfer of the Stock; and ſo the King anſwered as to that.—*Secondly*, They made no Difference between Outlawries before and after Judgment. *Thirdly*, They made no Difference between the Caſe of *Willoughby*, who was Aſſignee to the King's Aſſignee, and *Northey*, who was the King's immediate Aſſignee. *Fourthly*, Notwithſtanding that, *Northey* after the Reverſal of the firſt Outlawry, ſued and obtained Judgment againſt *Bateman*, yet they held no Difference between his Caſe and the Caſe of *Willoughby*, but that both of them ſhould retain the Proportions at firſt aſſigned to *Northey* and *J. S.*

* P. 50 Of the King's Intereſt in the Eſtate of one outlawed. Vide 1 Jo. 203. 1 Lev. 8, 33. 1 Vent. 193. 1 Salk. 108, 109.

Starling againſt *Turner*.

Caſe for denying a Poll in chuſing a Bridgmaſter. S. C. 3 Keb. 26, 32. 1 Vent. 206. 2 Vent. 25. Vide poſt, 114, 250. Vide 6 Mod. 45.

CASE, and declares that by the Cuſtom of *London*, the Bridge-maſter is choſe by plurality of Voices of the Freemen, and that if the Electors are ſo divided, that the Majority cannot be known by the View, that the Mayor ought to grant a Poll; and that *Starling* being Mayor, where upon the Election the Majority could not be known, refuſed to grant a Poll to *Turner*, a Candidate at that Election, by which he loſt the Office.

Office. After Verdict and Judgment for *Turner*, Plaintiff in the Common Pleas, Error was brought in *B. R.* and aſſigned for Error, That the Action lies not, becauſe it is not ſhewn that he had been elected if a Poll had been granted. *Sed non Allocatur.* For the Mayor did not do his Duty, and 'tis ſaid by that he loſt the Office, which after Verdict is ſufficient: And of that Opinion were all the Judges of the Common Pleas, but *Vaughan* Chief Juſtice.

2 Sid. 168. Lutw. 88. 1 Danv. 205. Plowd. 120. 1 Salk. 20, 21. 2 Salk. 502. 504. Want of averring the plurality of Votes cured *per quod perdidit officium.* Vide poſt, 88. * P. 51

* *Note*, It was not a Queſtion in either of the two Courts, Whether an Action of the Caſe would lie, for the bare denying or refuſing of a Poll, and returning another? But this ſeemed to be admitted by both Courts.

Watts againſt *Rymes.*

CASE, for ſaying to the Plaintiff, *You are a Pick-pocket, you picked my Pocket, and took away my Money, and I will juſtify it.* The Defendant juſtified for other Words, and traverſed the Words as here laid: The Plaintiff maintained the ſpeaking of the Words, as here laid, and Iſſue thereupon, and Verdict for the Plaintiff. But by the Court, Judgment was ſtayed, becauſe the Words themſelves are not actionable, and therefore the Plaintiff cannot have Judgment notwithſtanding the Juſtification.

Pick-pocket, not actionable. S. C. 3 Keb. 34. Vide 2 Salk. 694, 695.

Term.

Term. Sanct. Trin.

ANNO

24 Car. II. in Banco Regis.

Whaley againſt *Tankard.*

Tenant for 99 Years, if he live ſo long, levies a Fine and dies: He in Reverſion ſhall have five Years after his Death to avoid the Fine. S. C. 1 Vent. 241. Raym. 219. 2 Vent. 334. 2 Keb. 37. 3 Keb. 30, 37, 110.

EJECTMENT, upon Not guilty, and a long Special Verdict found at *York* Aſſizes, the Caſe was, A Settlement was made, by Covenant to ſtand ſeized, after divers other Uſes, to the Uſe of *Charles Maynel* for Ninety-nine Years, if he live ſo long, the Remainder to two Strangers for his Life to preſerve the Contingent Remainders; Remainder to the firſt, and ſo on to the tenth Son of *Charles* in Tail, the Remainder to *Edmund Maynel*, Father of the Leſſor in Tail, the Remainder to the right Heirs of the Covenantor. All the precedent Eſtates being ſpent, *Charles* the 14th of *October*, 1656. enfeoffed the Defendant, and in *Hill.* 1656. levied a Fine to him; *Edmund* Father of the Leſſor being then alive, and of full Age. *Edmund*, Father of the Leſſor, died the 8th of *March*, 1661. leaving the Leſſor then, and ſtill under the Age of one and Twenty. *Charles* died the 18th of *Auguſt*, 1664. without Iſſue male, leaving a Daughter ſtill alive. And the Leſſor entered and demiſed to the Plaintiff, and the Defendant ejected him; and the Queſtion was, Whether as this Caſe is, the Leſſor ſhall have five Years after the Death of *Charles* to avoid the Fine? For ſo the Leſſor being then and ſtill an Infant, the Leſſor

Leſſor is well in Point of Time to avoid the Fine. Or, if the Entry ſhould not have been made within five Years after the Fine levied? For then the Right of Entry is within the five Years attached in the Father, and ſo the five Years paſſed, and the Sons barred. This Caſe * was argued at Bar by *Levinz* for the Plaintiff, and *Weſton* for the Defendant. And for the Plaintiff it was ſaid, That if *Charles* had been Tenant for Life, he in Remainder would have had five Years after the Death of *Charles* the Conuſor, as is held in *Moor. pl.* 192. 3 *Cro.* 254. *Ibid.* 219. 3 *Cro. Salvin* and *Clark*'s Caſe, 9 *Co. Podger*'s Caſe, 2 *Co. Inſt.* 519. Though it is true, he might have entered for the Forfeiture in the Life of Tenant for Life, yet he is not bound to enter, but ſhall have five Years *de novo* allowed him, after the Death of Tenant for Life, within the ſecond Saving of the Statute of 4 *H.* 7. which ſaves future Rights; and the Title which comes by the Determination of the Eſtate for Life, is allowed to be a new Right within this Saving, which firſt accrues to him in Remainder after the Death of Tenant for Life. But *Coke* in *Podger*'s Caſe, and *Catlin* in *Plowden*'s *Comment.* 374. *a.* ſay it is otherwiſe, where Tenant for Years levy the Fine; but the Entry muſt be within five Years after the Fine levied, for in that Caſe, he in Remainder hath a preſent Right to maintain an Aſſiſe for the Diſſeiſin, done unto him by levying the Fine. And in this Caſe it may be urged, as indeed it is true, That *Charles* is no more than Tenant for Years, determinable by his Death. But to this it was argued for the Plaintiff, That there are no Words in the firſt or ſecond Saving of the Statute to warrant this Diverſity, nor are there any mention there of Freehold, or Chattels; but the firſt Saving of the Statute ſaves preſent Rights, and the ſecond Saving ſaves future Rights, ſo as the Entries be made within five Years. Now when Tenant for Life levies a Fine, he in Reverſion or Remainder hath a preſent Right to enter for the Forfeiture, as well as if Tenant for Years levies a Fine. And in this Caſe he in Remainder hath alſo a new Right of Entry when the Eſtate determines, as much as in the Caſe of Tenant for Life. If Tenant for Life be diſſeiſed, and a Fine levied by the Diſſeiſor, it is true he in Remainder cannot have an Aſſiſe, becauſe the Right

* P. 53

Right of Freehold remains in the Diſſeiſee; but when the Fine is levied by the Tenant himſelf, there is Difference between Tenant for Life, and Tenant for Years; in both Caſes it is a Forfeiture, and he in Remainder or Reverſion may enter, and bring his Aſſiſe immediately. And the true Reaſon why the Reverſion or Remainder is not barred in both Caſes, is becauſe they are dry
* P. 54 Eſtates, which yield no Suit or Service until the * Determination of the particular Eſtates, ſo that there is nothing to attract the Attention of him in Remainder or Reverſion, and make him regard the Eſtate. And *Farmer*'s Caſe, 3 *Co.* though it had other Ingredients in the Caſe, as continual Payment of the Rent, and alſo a Continuance of Poſſeſſion, yet in the principal Matter 'tis a Judgment in Point for this Caſe. For the Payment of the Rent there, when no Rent was to be paid, can't make a Difference; neither can the Continuance of Poſſeſſion make a Difference, for in the Caſe as it is put 3 *Cro.* 254. there was a Render in the Fine to a Stranger. But the better Reaſon in *Farmer*'s Caſe, is the Breach of Truſt and Confidence between the Leſſor and Leſſee, and that the Statute meant not to enable any one to levy Fines that was not enabled at Common Law. And at Common Law it was a good Plea to the Fine of Tenant for Years, *partes finis nihil habuerunt:* 5 *Co.* 5. *Saffin*'s Caſe. And although the Fine and the Feoffment in this Caſe were at ſeveral Times, yet being both made to the ſame Perſon, and to the ſame Uſes, they make only one Conveyance, and one Forfeiture. 1 *Co. Cromwel*'s Caſe, and 1 *Cro. Salvin* and *Clark*'s Caſe. It was alſo ſaid and agreed by all, That the Remainder to the two Strangers for the Life of *Charles* was void, they being not of Blood to the Covenantor, and ſo it was no Forfeiture as to them: And laſtly, That the Warranty in the Fine could be no Bar, it being deſcended upon the Son of the Conuſor. To which *Weſton* anſwered, That the Feoffment being made before, and the Fine levied after, though both to the ſame Perſon, takes off the Exception of *partes finis nihil habuerunt.* And this *Hale* Chief Juſtice agreed, and ſaid, That though in raiſing Uſes, and making Conveyances, Fines, Feoffments, Bargains, Sales, &c. may be one Conveyance, as in *Cromwel*'s Caſe, yet *in rei veritate*, a Freehold is conveyed to the Feoffee

Covenant ſtand ſeiſed to the Uſe of one who is not of the Blood, void. Vide Poſt, 75, to 78.

Feoffee immediately by the Feoffment; and ſo *parties finis nihil habuerunt* can't be pleaded, for the Freehold was in the Conuſee by the Feoffment, though the Conuſor had nothing. Then *Weſton* ſaid, That this Feoffment made by a Leſſee for Years, who had no Right to make Livery, was a Thing of notoriety, of which Tenant in Remainder ought to take Notice: Otherwiſe of Tenant for, becauſe he hath Power to make Livery, and hereupon would have maintained the Difference of *Coke* in *Podger's* Caſe, between a Fine by Tenant for Life, and Tenant for * Years, relying alſo upon the Feoffment, and the Fines being made and levied at ſeveral Times. But *Hale* ſaid, This would not make a Difference; for ſo it was in *Farmer's* Caſe, and to this Purpoſe, both are to be looked upon as one Conveyance to defraud him in Remainder: And he ſaid there could be no Difference between a Fine levied by Tenant for Life and Tenant for Years, and the Reaſon why in neither of theſe Caſes a Fine ſhall bar is, for the Truſt and Privity which is between the Leſſee and him in Remainder, that no prejudice be done by ſuch Acts: And that the Opinion of my Lord *Coke* was to be queſtioned; and the Opinion of *Catlin* was, that it is the ſame both in Caſe of Tenant for Life and Tenant for Years, which is contrary to all the Books before cited: All which was agreed by *Twyſden*, but upon the Importunity of *Weſton*, to be farther heard, *Adjornatur. Sed poſtea*, no one appearing to argue it farther in *Hilary* Term, Judgment was given for the Plaintiff by *Hale*, *Rainsford* and *Wylde*, abſent *Twyſden*.

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Feoffment, Fine, Recovery, &c. to what reſpect one Aſſurance, &c. to what not.

And *Note*, A Writ of Error was brought upon this Judgment, but before it came to be argued, the Deed made in the Time of King *James* the Firſt, and ſeveral Times viewed heretofore, and now found in this Special Verdict as a true Deed, was at laſt upon a Trial at Bar in this Court, found to be a forged Deed, as appears hereafter in *Eaſter* Term 25 *Car.* 2. for another Part of the ſame Eſtate; upon which there was no farther Proceeding upon the Writ of Error. And in Truth, at the Trial at *York*, the Defendant ſtood not much upon proving the Deed, being confident the Matter of Law was for him.

Vide ante & poſt, 84 & 2 Show. 5.

Thompſon

Thompſon againſt *Butler.*

Adminiſtration granted to the next of kin, there being a reſiduary Legatee, whether revocable?
S. C. 2 Keb. 23, 27, 34, 55. 1 Vent. 217. Vide poſt, 90, 182. Style 72, 102. Alleyn 36, 56. Cro. Car. 8, 106. Jo. 175. 1 Vent. 217, 219. Poſt, 90.

A MAN makes his Will; and thereby gives 2000 l. to his Daughter, and the Reſidue of his Eſtate after Debts and Legacies paid, to his Wife, and makes *J. S.* his Executor, and dies; *J. S.* died Inteſtate, and for ſix Years after, no one ſued Adminiſtration. At laſt the Daughter ſued out Adminiſtration *de bonis non, &c.* and ſo continued four Years, and during that Time obtained divers Judgments and Decrees as Adminiſtratrix. And now the Wife being reſiduary Legatee, cited the Daughter into * the Eccleſiaſtical Court to have this Adminiſtration repealed and granted to her, which the Eccleſiaſtical Court being ready to do, the Daughter prayed a Prohibition, ſurmiſing, there was no Reſidue. *Hale* Chief Juſtice ſaid, The Reaſon why Adminiſtration granted to the next of kin, was not revocable after the Statute of *H.* 8. is, becauſe it is intended that ſuch Adminiſtrator ſhould have the whole Reſidue to his own Uſe; and upon this Account the Ordinary could not grant Diſtribution, nor oblige the Adminiſtrator to diſtribute, till the Law was altered by the late Statute. But that has not altered the Caſe yet, where there is a reſiduary Legatee, for the reſiduary Legatee being to have the whole Surpluſage by the appointment of the Teſtator, and the Adminiſtrator nothing; he held, That Adminiſtration, though granted to the next of Kin, might be revoked and granted to the reſiduary Legatee. But it being here alledged that there is no Reſidue, whether that takes away this Power of Revocation *Curia adviſare vult.* And afterwards Dr. *Waller* argued and affirmed, that by their conſtant Practice, where there is a reſiduary Legatee, Adminiſtration granted to the next of Kin is revocable and grantable to the reſiduary Legatee, though there be not at preſent any Reſidue, becauſe of the Poſſibility that a Reſidue may ſtill happen; and cited the Counteſs of *Peterborough*'s Caſe to be ſo ſentenced. But Dr. *Maſters* for the Daughter, denied their Practice to be ſo; and cited *Button*'s Caſe, as ſentenced contrary, there being no Reſidue

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Reſidue at preſent. Afterwards the Parties agreeing in Court, the Caſe was not judicially determined.

Bolton againſt *Lee.*

Covenant *inſt A.* of one Part, and *B.* and *C.* of the other, & *quemlibet eorum*; *A.* brings an Action againſt *B.* only. S. C. 3 Keb. 39. 50.

COVENANT upon a Charter Party, between *Bolton* Owner, and *Lee* and *Morgan* Merchants, Freighters of a Ship, by which *Bolton* lent them the Ship to freight a Voyage to *Guinea*, for 48l. *per* Month: And it was mutually covenanted between the Parties, & *quemlibet eorum modo ſequente*, and then followed divers Covenants concerning Ship Tackle, and performing the Voyage, and then a Covenant for *Payment of Freight, *viz.* when the Ship arrives at *Guinea*, that the Freight then due ſhould be paid in *England* upon Notice of the Arrival, and when ſhe arrives in *England*, that all which ſhould be due from the Time of the laſt Payment, was to be paid. And ſets forth, That at ſuch a Time the Ship arrived at *Guinea*, and that ſix Months and ten Days were then paſſed, which came to ſo much; whereof Notice was given. And that afterwards at ſuch a Time the Ship arrived in *England*, and that then Freight at the Time of the laſt Payment for ſix Months, and the Freight ſince, came to 287l. 4s. and that the Defendant had not paid any of the Sums. The Defendant demurred; and took two Exceptions to the Declaration, 1. That the Action is brought only againſt one of the Merchants, and not againſt both; and the Covenant between the Parties is mutual; neither does the Covenant for them & *quemlibet eorum*, make it diſjunctive between the Parties of both Sides, but leaves it joint of the one Part, and ſeveral of the other, as the Duty itſelf is, which ought to be paid by both the Defendants, each having an equal Benefit; and the *quemlibet eorum* ſhall be referred to the Plaintiff only, who is the ſole Party of the one Side. *Sed non allocatur*; The Covenant being between them & *quemlibet eorum*, is joint and ſeveral of both Sides. 2. It appears by computation, That the Plaintiff demands more than his Due upon the firſt Breach by 30s. and leſs than is due upon the ſecond Breach by 16s.: And though the firſt may perhaps be cured by the Jury's finding leſs, or

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Covenant for Money, and demands more or less than due.
5 Bac. Abr. 302.
Cowp. 766.
1 Term. Rep. 447.
2 Term. Rep. 29.
Vide ante 4 & post. 99, 100.
1 Lev. 58.
2 Show. 56, 88, 89.
Ante, 4.

the Plaintiff's Release of the Overplus; yet this Demand of less than is due, is a Fault incurable: So is 2 *Cro.* 247. *Adderton* against *Dunton*, in *Assumpsit*, *Poph.* 209. *Latch.* 175. *Style* 214. *Hob.* 88. *Latchlow* against *Tomlinson & ibidem* 89. *Baily* against *Good*, all in *Assumpsit*, from which Covenant cannot differ, for all is to be recovered in Damages in both Cases. And *Clotworthie*'s Case, 1 *Cro.* in Annuity, and *Baily* and *Offord*'s Case, *ibid.* in Debt. and *Hill.* 21 & 22. of this King *inter Hulm* and *Saunders* in Debt. Of the other Side for the Plaintiff were cited 2 *Cro.* 198, 529. that it is good in other Actions, not in Debt. *Hale* Chief Justice took a Difference between this Case of Covenant and Debt. And held, That after Verdict it is unquestionably cured, though upon general Demurrer it would be doubtful, but upon a Special Demurrer it is clearly naught, and * gave Rule for Judgment *pro querente*; saying the Defendant might move it in Arrest of Judgment, after the Writ of Inquiry, if he thought good: But it was not moved, and so Judgment passed absolutely for the Plaintiff. Sir *William Jones* Counsel for the Plaintiff, *Levinz* for the Defendant.

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King against *Melling*.

S. C. 1 Vent. 214, &c. 225.
3 Keb. 42, 52, 95.
Vide 1 Roll. Abr. 833, 836, 837.
Raym. 425.
3 Lev. 70.
2 Lev. 58, 162.
3 Mod. 81, 104, 123.
1 Lutw. 829.
&c. prox. pag.
Devise to one for Life, and after his Death to his Issue, with Power to make a Jointure, an Intail.
Vide post. 162, 163.
2 Lev. 70, 71.

EJECTMENT, and upon *Non culp.* a Special Verdict, wherein the Case was, *Robert Melling* seised in Fee, devised to *Bernard Melling* for Life; and after his Death to the Issue of his Body by a second Wife, (he having at the Time of the Devise another Wife) and for default of such Issue to *John Melling*, the Lessor of the Plaintiff; Provided, that *Bernard* may make a Jointure to his second Wife for her Life, and died. *Bernard* entered, and during the Life of his first Wife suffered a Common Recovery to the Use of him and his Heirs; his said Wife died, and he afterwards married the Defendant, his second Wife; and covenanted to stand seised to the Use of himself and his second Wife for their Lives, Remainder to the Heirs of their two Bodies: Remainder to the right Heirs of the Survivor of them, and died without Issue, and the Defendant his second Wife entered; upon whom *John Melling* the Remainder Man in the Will named, entered

and

and demiſed to the Plaintiff. This Caſe was argued by *Coleman* for the Plaintiff, and *Levinz* for the Defendant, and three Points were made. 1. If *Bernard* took an Eſtate Tail in Poſſeſſion, or only an Eſtate for Life, the Remainder to his Iſſue? 2. If he took only an Eſtate for Life, and that forfeited by the Recovery, yet whether or not his Power to make his Wife a Jointure, does ſtill remain? 3. Admitting the ſaid Power to remain, whether it has been well executed? *Coleman* argued he took only an Eſtate for Life, by Reaſon of the expreſs Words in the Will, and cited *Wilde*'s Caſe, 6 *Co.* reſolved by all the Judges of *England*: A Deviſe to Baron and Feme for Life, and after their Deceaſe to their Children, they having at that Time Children, is only to them for Life, Remainder to their Children for Life. And it is there ſaid, * That in a Deviſe to a Man for Life, and after his Death to his Children, the Children take by Remainder: And 4 *Eliz. Benloe* was cited, and 1 *Rol.* 837. Deviſe to one for Life, Remainder to the Sons of his Body, and if they alien, to his Daughter, reſolved the Father takes only an Eſtate for Life: And 1 *Co. Rep. Archer*'s Caſe, a Deviſe to *Robert* for Life, and after his Death to the next Heir male of his Body, and the Heirs male of the Body of ſuch Heir male, is adjudged an Eſtate for Life to *Robert*. 2. He argued, That the Power to make a Jointure was forfeited and extinguiſhed by the Recovery, being not a bare Power, but a Power coupled with an Intereſt; like *Albany*'s Caſe, and *Digg*'s Caſe, 1 *Co. Rep.* 3. He urged, That this is not a good Execution of the Power, admitting it not to be extinguiſhed: For 1 ſt. The Privity of Eſtate, upon which the Power depended, is tolled by the Recovery: And 2d. He having nothing of the old Eſtate left in him, out of which the Uſe could ariſe, it muſt ariſe out of his new Eſtate gained by the Recovery, which is now avoided and deſtroyed by the Entry of *John* in Remainder. *Levinz e contra*; And 1 ſt. he argued, That *Bernard* took an Eſtate-tail executed in him, and the Iſſue by the ſecond Wife could not make it a contingent Eſtate. For a Gift to a Man, and the Heirs of his Body by the Wife of another Perſon, is not a contingent, but a preſent Eſtate-tail in the Donee. *Co. Lit.* 120. *b.* 184. *a. Plowd. Com.* 35. *a.* And as to *Wild*'s Caſe, where

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Eſtate-tail per Deviſe. 1 Bulſt. 219. 1 Rol. Ab. 833, 834, 836, 837. Mo. 13, 422, 593, 637, 772. 853, 864, 397. Dyer 122, 133. 171. 302. Hob. 75. Cro. Eliz. 248. Lane 57. 1 And. 8, 43, 106. Ow. 29, 140. Lit. Rep. 4, 346. 1 Leon. 57, 211, 227. 3 Leon. 211, 247. 6 Co. 16. 9 Co. 127. 10 Co. 78. 1 Co. 175. Cro. Car. 51, 57. 2 Cro. 61, 415, 427. 448, 695. 2 Lev. 58, 162. Raym. 425. 3 Lev. 70. 3 Mod. 81. 104, 123. 1 Lutw. 823.

it is ſaid, a Deviſe to a Man and his Wife, and after their Death to their Children, they having then no Children, that the Children after-born may take by Remainder; the Point was not judicially before the Court, but an *obiter dictum*; and in *Benloe*, 4 *Eliz. Paſch.* 30. the Caſe appears to be thus: A Deviſe to *William* his Son for his Life, and after his Death to his Men-children, and yet adjudged an Eſtate-tail; ſo that the Caſe cited by my Lord *Coke* to maintain his Opinion is contrary to his Opinion. And the ſame Caſe is reported 1 *Anderſ. placit.* 110. without making any Difference, whether he has then Men-children, or not. And as to the Caſe 1 *Rol.* it there appeared the Deviſor's Intent was, That the Father ſhould be only Tenant for Life, the Eſtate-tail to the Son, for that the Clauſe to reſtrain Alienation is added only to the Eſtate of the Son. And as for *Archer*'s Caſe, there the Words, *To the Heirs males of the Body of the Heir*, as there added, manifeſt his Intent to exclude *Robert* the Father from * having having any Eſtate of Inheritance: He alſo cited 1 *Rol.* 839. *S.* 4. a Deviſe to *Roſe* for Life, and if ſhe marry after his Death, and hath Heirs of her Body, that the Heirs ſhould have the Eſtate: Reſolved, *Roſe* takes an Eſtate-tail; and 2 *Rol.* 253. a Deviſe to *A.* for Life, and after his Death to the Heir of his Body, in the ſingular Number; and yet reſolved, an Eſtate-tail in *A.* And the Reaſon why the Word *Iſſue* in a Will makes an Eſtate-tail, is becauſe Iſſue in a Will (made by Men *inopis Conſilii*) is conſtructively to be taken as of the ſame Effort with the Word *Heirs*. And by the Rules of Law, when an Eſtate is limited to the Anceſtor for Life, the Word *Heir* coming afterwards, cannot be taken to be a Word of Purchaſe. 2. He argued and agreed, That a Power coupled with an Intereſt in the ſame Perſon, is deſtroyed by his Feoffment, Fine, *&c.* for the Power is to be executed upon his own Eſtate, and with that he has departed: But in this Caſe, the Power is not to be executed upon the Eſtate of *Bernard*, ſuppoſing his Eſtate to be for Life; but it is to make his Wife a Jointure, which is not to take Place till after his Death; and to charge the Reverſion only, and ſo merely collateral to his Eſtate for Life. And ſuch collateral Powers are not deſtroyed by Feoffments, *&c.* 15 *H.* 7. a Power to

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Vide *Fry* and *Porter*'s Caſe, 1 Vent. 199. Ravm. 230. Rex Teſtament. 387.

Vide Yelv. 9. Poſt. 79. 3 Lev. 127. 1 Salk. 241. 2 Mod. 286.

to Executors or Truſtees to ſell to *J. S.* though they make a Feoffment to *J. D.* yet they have Power to ſell to *J. S.* 3. He ſaid, That *Bernard* in this Caſe was no more than an Inſtrument to convey a Jointure to the Wife, and when ſhe is in, ſhe is in by the Deviſor; and therefore if by Virtue of ſuch a Power [illegible] or ſells a Rent without Deed, the Sale is good, [illegible] Vendee is in by the Will. And though he hath [illegible] made a greater Eſtate than he ought to her, yet what he hath ſo made is good for ſo much as he was impowered to make, and void for the Reſidue. *Co. Lit.* 258. *a.* Where one doth leſs than his Authority, all is void: When more than he had Authority, the Act is good for ſo much as is within his Power, but void for the reſt. *Hale* Chief Juſtice upon this Argument held, That *Bernard* took only for Life; for it is only by Conſtruction in Wills to anſwer the Intent of the Teſtator, that Iſſues are taken as of the ſame import with Heirs; and when the Deviſe is by expreſs Words to the Father for Life, it cannot be a good Conſtruction ſo to conſtrue the Words, *And after his Death to his Iſſues*, ſo as to deſtroy the Effect of the expreſs Words before: Alſo he held, * That the Power was deſtroyed by the Recovery, or otherwiſe the Execution might have done well enough. *Twyſden* and *Rainsford*, being only in Court, inclined to *Hale*'s Opinion in the firſt Point, but ſaid nothing as to the others. *Adjournatur.* After, at another Day, *Hale*, upon Conſideration of the Books, changed his Opinion, and held, That *Bernard* took an Eſtate-tail; but *Twyſden* and *Rainsford* held it only an Eſtate for Life: But all three agreed, That the Power was extinct by the Recovery, or otherwiſe the Execution was well enough. But by the Opinion of two againſt *Hale*, Judgment was given for the Plaintiff, whereupon Error was brought immediately in the Exchequer-Chamber, where the Judgment was reverſed upon the Point in Law; for there all agreed, That *Bernard* took an Eſtate-tail; and in *Eaſter* Term, 27 *Car.* 2. *in Camera Scaccarii* the Reverſal was pronounced. *Levinz* for the Plaintiff in Error.

Power executed in Part, is void for the Whole, but executed in the Whole and more, is void only for the Surpluſage.

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Tenant in Tail, with Power to make a Jointure, ſuffers a Recovery, it does deſtroy his Power.

Bayly

Bayly againſt *Munday.*

A Parſon makes a Leaſe for Years, which is confirmed, this does not determine by his Death, as by Non-reſidence 8. C. 1 Vent. 244. 245, 246. 3 Keb. 46, 107, 193. 3 Bac. Abr. 371. 396. Cowp. 129. 429. 2 Term. Rep. 749.

EJECTMENT, and upon *Non Culp.* and a Special Verdict the Caſe was, A Vicar having made a Leaſe for Years, did after upon the 11th of *September*, the firſt Leaſe being unexpired, make a new Leaſe for twenty-one Years, to commence at *Michaelmas* next, rendering the ancient Rent, and more, payable at four Days, or within twenty Days after, which Leaſe was confirmed by the Biſhop, being Patron and Ordinary, and by the Dean and Chapter; the Vicar died, his Succeſſor made a new Leaſe to the Leſſor of the Plaintiff, upon which this Ejectment was brought, and the Caſe was twice argued at Bar, *viz.* This Term by *Thurſby* for the Plaintiff, and *Turner* for the Defendant; and *Hill.* 23 & 24 by Sir *William Jones* for the Plaintiff, and Sir *Richard Hardres* for the Defendant. And after in *Trinity* Term Judgment was given for the Plaintiff by the whole Court, *viz. Hale*, *Twyſden*, *Rainsford* and *Wylde*. In this Caſe three Points were argued, 1ſt. Whether the Leaſe of a Parſon or Vicar ſo confirmed be void by his Death, according to what is ſaid, to be adjudged in *Mott* and *Hale*'s Caſe, 3 *Cro.* upon the Statute of *Non-reſidence*, *viz.* if Death * be a Non-reſidence within this Statute? And reſolved by the whole Court, it is not: For a Non-reſidence within the Statute is a Non-reſidence voluntary and puniſhable by the Statute; but a dead Man is not puniſhable: And Non reſidence may be excuſed by Sickneſs. 6 *Co. Butler* and *Geodale*'s Caſe, and *Moor. pl.* 609. by the Exhibition of the Ordinary. And in that Caſe of *Mott* and *Hale*, though reported by *Croke* to be adjudged: Sir *Francis Moore* ſays in his Report of it, The Court were divided in Opinion in that Point. 2. The whole Court agreed, That the Reſervation of this Rent at four Days, or within twenty Days after, does not make the Leaſe void, it being for the Advantage of the Succeſſor: as ſuppoſe his Predeceſſor dies after the four Days, and within the twenty. 3. All agreed, That this Leaſe made the 11th of *September* for twenty-one Years, to commence at *Michaelmas* next, is a Leaſe in Reverſion, and therefore void: But *Hale* ſaid, The firſt Leaſe being *in eſſe* does not make this a Leaſe

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Perſon makes a Leaſe, rendering Rent at four Days, or twenty Days after good.

Parſon makes a concurrent Leaſe, the firſt being to end in three Years.

Leaſe in Reverſion, but a concurrent Leaſe, which a Vicar may make, the former Leaſe being to determine within three Years; to which the reſt ſaid nothing, *Twyſden* only ſeeming to diſagree thereto.

Reeve againſt *Holgate*.

CASE, for ſaying of the Plaintiff, being a Malſter, *habens Colloquium* of him and his Trade; *Have a care of him, and do not deal with him; he is a Cheat, and will cheat you; he has cheated all the Farmers at* Epping, *and dares not ſhew his Face there, and now he is come to cheat at* Hatfield. A Special Verdict found all the Words, but that there was no *Colloquium* of his Trade. *Curia.* The Words themſelves ſupply a *Colloquium*, they appear to be ſpoke of his Trade: Judgment for the Plaintiff.

Of a Malſter, *He has cheated all the Farmers at* E. without a *Colloquium* of his Trade, actionable. 3 Keb. 54.

* *Betniff* againſt *Pepple*.

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A PROHIBITION was prayed to the Spiritual Court, to ſtay a Suit there for calling a Woman *Whore*; but denied upon Conſideration, having been twice debated both at Bar and Bench; for it is an Eccleſiaſtical Slander, and examinable and puniſhable in the Eccleſiaſtical Court, and it is not to be conſidered only as a ſaying of Scolding and Paſſion.

Suit in the Spiritual Court for calling a Woman *Whore* S.C. 3 Keb. 58, Vide Nelſon's Lutw. & 1 Lev. 116, 2 Salk. 552, 698, &c.

Fawcet againſt *Beaures* and his Wife.

CASE, and declares that he retained *A.* to ſerve him a Year, and that he went away without Leave, and the Defendants *ſatis ſcientes & machinantes* to deprive the Plaintiff of the Service of the ſaid *A. retinuerunt & cuſtodiverunt* the ſaid *A. licet ſæpius requiſitus* to the contrary. Judgment was given *in Communi Banco*

Caſe for retaining his Servant departed without Licence, 3 Keb. 59. 6 Mod. 99. 182, 289. 1 Salk. 382.

Banco by Default; whereupon Error was brought and aſſigned, that the Action lies not, for they did not intice the ſaid Servant to go away, and he of himſelf having deſerted the Service of the Plaintiff, and being thereby at Liberty, it was lawful for the Defendants to receive him. *Sed non allocatur*, for the Action lies without their Incitement, they having Notice that he was the hired Servant of another; whereupon they affirmed the Judgment.

Lies againſt Baron and Feme. Vide 1 Roll. Abr. 6. pl. 6, 7. & 348. V. 1 Danv. 22, 23, 713. & poſt, 145.

Nota, No Notice was taken of the Action being brought againſt the Huſband and Wife, and a Feme covert cannot retain or contract. But perhaps the receiving and keeping him without Contract, is a Treſpaſs of which a Feme covert may be guilty, ſufficient to maintain this Action againſt her.

* P. 64

* *William Juxon* againſt the Lord *Byron*.

Spiritual Court may proceed upon an Act or other temporal Matter incident, as long as they proceed according to the Rules of Common Law. 8. C. 2 Salk. 537. 1 Lev. 164, 180. 2 Com. Dig. 513. 4 Bac. Abr. 261. 3 Bl. Com. 112.

SIR *William Juxon* prayed a Prohibition to the Spiritual Court of *Cheſter*, ſhewing that the Archbiſhop of *Canterbury* being ſeized of the impropriate Rectory of *Rachdale*, in the County of *Lancaſter* and Dioceſs of *Cheſter*, demiſed the ſame to the Lord *Byron* for twenty-one Years (about the Year 1661.) who afterwards mortgaged the ſame to *Pery*, who was indebted to Sir *William*, and went off to Places unknown; whereupon it was enacted by a private Act of Parliament, That this Mortgage ſhould be inveſted in Sir *William Juxon*, to all Intents and Purpoſes as it was in *Pery*: And that the Lord *Byron* libelled in the Eccleſiaſtical Court, againſt divers of the Tenants for Tithes due after the ſaid Act: Upon which Sir *William Juxon* came in *pro intereſſe ſuo*, and ſet forth all the ſaid Matter to the Court; yet they nevertheleſs proceeded and gave Sentence againſt the Tenants for the Tithes, for which he prayed a Prohibition, *Firſt* Becauſe the ſaid Court is not to meddle with the Conſtruction of Acts of Parliament. 2 *Roll.* 306, 307. *Secondly*, Admitting they may hold Plea of a Temporal Matter incident in an Eccleſiaſtical Cauſe, according to 12 *Co.* 65. *Fuller* and *Wiſcard*'s Caſe, yet this is no longer allowable than while they proceed according to the Common

Common Law in that Matter, for they ſhall not be ſuffered to proceed in an incident temporal Matter contrary to the Courſe of the Common Law. And here they have determined contrary to the Courſe of the Common Law, that the Rectory in Effect was not well ſettled in Sir *William* by the Act of Parliament, becauſe they have given the Tithes due after the ſaid Act, to the Lord *Byron*. But the Prohibition was denied *per Hale* and the whole Court; they agreed, that the Spiritual Court, though they may try Matters cognizable at Common Law, which fall in incidentally where the Principal is Eccleſiaſtical; yet they ſhall be prohibited if they proceed in the Trial of ſuch incident temporal Matter otherwiſe than the Common Law would; But they have not done ſo here, for the Act veſts the Mortgage in Sir *William Juxon*, as it was in *Pery*, and *Pery* being but a Mortgagee and out of Poſſeſſion, and *Byron* the Mortgagor in Poſſeſſion, *Pery* could not at Common Law have recovered the Tithes till he had gained * the Poſſeſſion of the Rectory by Ejectment; no more can Sir *William Juxon*. But till the Rectory be recovered from the Lord *Byron*, the Tithes belong to him. So that they have given the ſame Judgment in their Court, as this Court would have given, and this being affirmed here to be the Ground of their Proceeding there, a Prohibition was denied without putting the Lord *Byron* to plead to the Suggeſtion.

* P. 65

Term.

Term. Sanct. Mich.

ANNO

24 Car. II. in Banco Regis.

Henloe againſt *Peters* and *Buck.*

Solicitors in Ejectment committed till they find a Plaintiff able to pay the Coſts. Vide 4 Mod. 279. 1 Lil. 210, 211.

EJECTMENT upon the Demiſe of the Duke of *Richmond*, and Verdict and Coſts taxed for the Defendant, the Plaintiff being not to be found, and the Duke a Perſon privileged by Parliament, and alſo at this Time Ambaſſador beyond Sea; ſo that no Coſts could be had againſt him, the Court ruled, That the Duke's Agents *Wrenham* and *Tilſon*, who gave the Name of the Plaintiff to *Hill* the Duke's Attorney, ſhould pay the Coſts, or produce a Plaintiff able to pay them, and committed them till they did ſo.

Toſer and his Wife againſt *Davis.*

Suit in the Spiritual Court by Baron and Feme for calling the Baron *Cuckold.* Vide 2 Salk. 692, 693.

THE Plaintiffs ſued *Davis* in the Eccleſiaſtical Court, for calling *Toſer*, *Cuckold and Cuckoldly Knave*, whereupon a Prohibition was granted *niſi cauſa tali die*; at which Day *Levinz* for Cauſe ſhewed, That the Baron and Feme joining in this Suit, no Prohibition ought to go, *aliter* if he had ſued ſole, 2 *Rolle* 296. for theſe Words charge the Feme with Incontinence, for which it is reaſonable ſhe ſhould be allowed this Suit in the Spiritual Court to puniſh a Defamation, which ſubjects her to Penance there; But if the Huſband

Husband had sued there solely, a Prohibition would have lain, for he does not incur any danger of that Nature by the speaking of these Words. And of that Opinion was the Court, and discharged the former Rule for the Prohibition; and next Term * a Prohibition was also denied in a like Case *int' Luchin & Lightbridge* upon the Motion of *Pollexfen*. * P. 67

Daniel against *Hanslip*.

IN this Case *Hale* Chief Justice said, That if a Man hath Common Appurtenant to a Messuage and Land for certain Number of Beasts, he may alien the same; *aliter* if it be Common for all his Beasts levant and couchant upon the Land, he cannot by his Alienation sever that from the Land.

Common, when alienable. Vide 1 Salk. 171, 266.

Wood against *Kirkham*.

DEBT upon Obligation conditioned to perform Covenants: The Defendant pleaded the Indenture, which was to return all the Effects of Goods sent to *Barbadoes*, and that he had performed all the Covenants. The Plaintiff replied, That such and such Goods were sent to *Barbadoes*, of which he had returned no Effects. The Defendant rejoined, That he had no Order to return the Effects of them: To which it was demurred, and Judgment for the Plaintiff; for this is a Departure, there being no mention of Order in the Covenants: But by *Hale*, Had the Covenant been that they should return upon Order, the Plea had been good. *Quære* hereof, for Performance in a Plea is understood actual Performance, and want of Order seems to be no more than an excuse of Performance. *Quære tamen*, for the Covenant in such Case is not to be performed without Order; and so *performavit omnia* may be taken, that he had performed all that he ought to perform, he not having Orders.

Departure in pleading. 1 Saund. 109, 268, 269. 2 Saund. 189, 190.

Elborough

* P. 68

* *Elborough* againſt *Gates.*

Award delivered to the Parties at another Day and Place than appointed by the Submiſſion.
S. C. 3 Keb. 89, 125.
Vide 1 Salk. 75.
6 Mod. 82, 260.
1 Lev. 113.
1 Sid. 260.
2 Vent. 242.
2 Danv. 27, 3.

DEBT upon an Obligation, conditioned to perform an Award *ita quod* it be made ready to be delivered to the Parties at ſuch a Day and Place. The Defendant pleaded no Award: The Plaintiff replied and ſet forth an Award made and delivered to the Parties before the Day, and at another Place; whereupon the Defendant demurred: And *Hale* held the Replication ill; for being but the Execution of an Authority, it ought to be done at the Time and Place appointed; *Cæteri contra*, it being delivered to the Parties themſelves it is good, though at another Day and Place; and by them Judgment was given for the Plaintiff.

Davenant againſt the Biſhop of *Sarum.*

Covenant to pay all Taxes, to what Taxes it extends.
S. C. 1 Vent. 223, 224.
2 Danv. 56. pl. 1.
3 Keb. 69.
Seiſin in ſole Corporations muſt be pleaded *in jure Corporationis.* Covenants in Biſhops Leaſes bind not the Succeſſor, unleſs in former Leaſes uſed.
Vide ante 26. poſt, 124.
1 Saund. 47.
2 Saund. 420.
Mo. 247, 480.
2 Vent. 25, 99.

COVENANT, and declares that the Biſhop's Predeceſſor was ſeiſed of theſe Lands, and in 1635 let them, and covenanted that he and his Succeſſors ſhould pay all Taxes during the Term; and for Breach aſſigns, that ſuch a Tax was laid by Parliament for a Royal Aid in 1665, and that the Biſhop had not paid it. The Defendant demurred and had Judgment: *Firſt*, Becauſe it is not alledged that the Biſhop was ſeiſed *jure Epiſcopatus*, and in pleading Seiſin in all ſole Corporations, the Pleading muſt ſhew *in quo Jure* they were ſeiſed, otherwiſe of Corporations aggregate. *Secondly*, This Covenant is not good to bind the Succeſſor unleſs ſuch Covenants have uſually been inſerted in former Leaſes which is not here ſhewn. *Thirdly*, If ſuch Covenants have been in former Leaſes, yet this here cannot oblige him to pay this new Tax created by Parliament, but muſt be underſtood of ſuch Taxes as were then in Uſe, *ſcilicet* Synodals, *&c.* and *Hale* cited a Caſe formerly ſo adjudged.

Morſe

* *Morſe* againſt *Slue.* * P. 69

CASE againſt the Maſter of a Ship and declares upon the Cuſtom of the Realm for Maſters of Ships to keep ſafely Goods delivered to them to carry, Dangers of the Sea excepted; and that the Plaintiff delivered to the Defendant, Maſter of ſuch a Ship ſuch and ſuch Goods, and he *tam negligenter* kept them that they were loſt: And upon Not guilty a Special Verdict found that *A. B.* and *C.* being Owners of the Ship, made the Defendant Maſter, and gave him ſo much Pay by the Month, and the Plaintiff being a Merchant, delivered the Goods to the Defendant to be tranſported, that he kept four Men conſtantly in the Ship to guard the ſame; and that this is the uſual guard for ſuch Ship, but the Goods were loſt in Port before the Ship ſet Sail: And whether the Maſter ſhall be charged for this Loſs? was the Queſtion; the Caſe was twice argued at Bar this Term and the next; and for the Defendant it was urged: *Firſt*, That here is no Cauſe of Action againſt any Man, for no Neglect is found, the Ship had the uſual Guard, and therefore the Plaintiff himſelf muſt bear the Loſs, and has no Action againſt any one for Compenſation. *Secondly*, If any Action will lie in this Caſe, it lies againſt the Owners of the Ship to whom Plaintiff pays Freight, and not to the Maſter, who is no more than a Servant to them at a certain Salary; and this is not like the Caſe of a Hoy-man, *Hob.* 17. for in that Caſe the Hoy-man was paid by the Plaintiff, and was himſelf Owner of the Boat. But in *Hillary* Term following Judgment was given for the Plaintiff *per Hale*, who delivered the Opinion of the whole Court, and held, that this Caſe differs not from the Caſe of the Hoy-man.

Caſe againſt the Maſter of a Ship, for Goods loſt without his Default. S. C. Raym. 220. 1 Mod. 85. 1 Vent. 190; 238. 3 Keb. 72, 112, 135. 1 Danv. 12. Vide 1 Sid. 36, 245. Molloy 209, 212, 230, 231. Hob. 245. Palm. 203. 523. Cro. Jac. 262.

1 Roll. Abr. 2. pl. 2, 3. Cro. Jac. 262, 330. 1 Sid. 36, 245.

* *Scot* againſt *Bell.* * P. 70

EJECTMENT upon a Leaſe by Sir *Nathaniel Hobart*, and upon *Non Culp.* in a Trial at Bar, the Caſe upon the Evidence was thus: Sir *Robert Bell* 8 *Jac.* 1. upon his Marriage with the Lady *Mary Cheek*, ſettled

A Feme covert joins in an Alienation of her Jointure, and had another made the

same Day without precedent Articles or Agreement, not fraudulent *quoad* Purchasors. S. C. 3 Keb. 82. Vide post, 146, 147, 148. 2 Show. 46. 1 Mod. 76, 119.

settled the Manors of *Brandon*, *Broking* and *Bardolff-Farm*, to the Use of himself for Life, Remainder to their first and tenth Sons in Tail, the Remainder to his own right Heirs, and the Manor of *Beaupre* and other Lands now in Question, to the Use of him and his Heirs; and afterwards 3 *Jan.* 11 *Jac.* 1. he being then indebted 4000*l.* he and his Wife by Fine sold the Jointure Lands, (having then no Issue) for Payment of the Debts; and the same Day he covenanted to stand seised of the Manor of *Beaupre*, and the other Lands now in Question, to the same Uses as the Manor of *Brandon*, *&c.* were settled before; the Debts were paid, and about fifteen or sixteen Years after he happened to contract new Debts, for which Sir *Nathaniel Hobart* being bound with him, he for the Security of *Hobart*, 13 *Car.* 1. made a Lease for 1000 Years of the Manor of *Beaupre*, and other the Lands now in Question, to the said Sir *Nathaniel Hobart*, *Hobart* was forced to pay several of the Debts, and therefore by Virtue of the said Lease for 1000 Years, demised to the Plaintiff, who brought this Ejectment; the Question was, Whether the Settlement of 11 *Jac.* was fraudulent and avoidable *quoad* this Lease? It was objected, *First*, That there were no Articles precedent to this second Settlement, nor any precedent Agreement that it should be done in Consideration the Wife levied the Fine for the Sale of her first Jointure, and so it does not appear but that the Fine and Sale of the first Jointure was the mere voluntary Act of the Wife, and the new Settlement also voluntary. *Secondly*, The Husband without the Wife might have destroyed the contingent Remainders limited to Sons, no Son being then born, nor any mean Remainder limited to preserve them, so no Consideration can be (pretended) but only the Estate of the Wife for her Life, and she is now dead; and therefore all the Remainders to the Sons upon the new Settlement were voluntary. * But by *Hale & Curiam*, the Settlement 11 *Jac.* is not void as to the Lease for 1000 Years, for the old Settlement being destroyed, and the new made the same Day, an Agreement by him to make the new Settlement, in Consideration the Wife would pass the Fine and bar the old Settlement, shall be intended, and the Consideration shall extend to all the Uses of the new Settlement; for it shall not be presumed

* P. 71

ſumed that the Wife would have parted with her Eſtate by the old Settlement, unleſs the Baron would make the ſame Proviſion for her and her Iſſue by the new; and though it is true, he might have deſtroyed the Limitation to Sons without his Wife's Concurrence, yet that Point was not ſo well known then as it now; and no one then would have purchaſed under him if ſhe had not joined; and if they would, it had been a hard and unhandſome Thing in him to have deſtroyed the firſt Settlement made in Conſideration of the Marriage, without making any new Settlement in recompence thereof: Whereupon notwithſtanding the Lands in the new Settlement 11 *Jac.* were almoſt of double Value to thoſe in the firſt Settlement 8 *Jac.* yet by Direction of *Hale*, and Aſſent of the whole Court, the Jury gave their Verdict for the Defendant, Son of Sir *Robert Bell*, by the Lady *Mary*, Sir *Robert* himſelf being now dead; *Levinz* being of Counſel for the Defendant.

The King againſt the Lady *Broughton.*

INFORMATION againſt her, being Keeper of the *Gatehouſe* Priſon at *Weſtminſter*, by Virtue of a Leaſe for Years from the Dean and Chapter of *Weſtminſter*, who have the Inheritance of that Priſon; that ſhe at divers Times between the 2d of *May*, 22 *Car.* and the exhibiting this Information the 24 *June*, 22 *Car.* 2. took ſeveral Sums of Money from ſeveral Perſons extortiouſly, and reckons twelve Priſoners *nominatim:* After Verdict for the King upon *Non Culp.* it was moved in Arreſt of Judgment by *Simpſon*, that this Information in a criminal Caſe, in ſaying *at divers Times between ſuch a Day and ſuch a Day*, is too general, for every Day and Place ought to be particularly mentioned; *Sed non allocatur*, whereupon the Court fined her 500*l.* ſeiſed the Office, and put in another at the Nomination of the Dean and Chapter; and though they ſay, that * in ſtrictneſs this was a Forfeiture of the whole Office, yet the Court did as in the 39th of *H.* 6. upon a Forfeiture by the Marſhal of this Court, who was put in for Life by the Duke of *Norfolk*, Owner of the Inheritance of the Office, the Court there did not

Gaoler for Life commits a Forfeiture, he in Reverſion in Fee may take Advantage. Vide 3 Lev. 288, 290.

Laid *diverſis diebus* between ſuch a Day and ſuch a Day.

* P. 72

not ſeiſe the Inheritance, but diſplaced the Officer of the Duke, and put in another at his Nomination, *ut hic.*

Earl of *Athol* in *Scotland*, againſt the Earl of *Derby*.

Privilege of Peers in Parliament. 2 Salk. 510, 512.

THE Earl of *Athol* having a Decree againſt the Earl of *Derby* for 7000 l. the Portion of his Wife, who was Siſter to the Earl of *Derby*; upon a Queſtion touching the Privilege of Peers in Parliament, How long it laſted? the Lord Chancellor before he would grant a Sequeſtration, ſent to the Lord *Hollis* and other Lords to be informed in this Matter; who hereupon ſent him two Orders of the Houſe of Lords, the one dated the 28th of *May*, 1614, the other the 27th of *Jan.* 1628. entered in the Journal Book of the Houſe of Lords; by which it appears that they declare their Privilege commences from the *Teſte* of their Writ of Summons to Parliament; and that upon every Seſſion and Prorogation their Privilege is for twenty Days before, and twenty Days after each Seſſion, which the Order ſays is Time enough for them to come from all Parts of the Realm, and to return. Hereupon the Lord Chancellor ordered the Sequeſtration to be delivered and executed immediately after the twenty Days: But it is ſaid the Commons never aſſented to this, but claim forty Days after and before each Seſſions.

Nota, The Sequeſtration was executed accordingly, but the Earl of *Derby* died in a ſmall Time afterwards, and his Eſtate being intailed, the Earl of *Athol* loſt the Benefit of the Sequeſtration.

* P. 72

* *Welſh* againſt *Bell.*

Pleads Matter of Fact, *& hoc paratus eſt verificare prout Curia conſideraverit.* Raym. 218. 1 Sid. 422.

ERROR by four Perſons, upon a Judgment had againſt them all, and aſſigned for Error, that one of them *fuit infra ætatem*, and yet all appeared *per Attornat. & hoc parati ſunt verificare prout Curia conſideravit.* The Defendant pleads *In nullo eſt erratum*, and

now

now it was objected by *Buck*, That the Aſſignment of Error is ill concluded, for this is Error in Fact, and triable *per pais*, and the Concluſion *prout Curia conſideraverit*, puts the Trial upon the Court; he cited *Yelv.* 58. & 1 *Bulſt.* 37. *Hale* ſeemed to think the Concluſion well enough; and that the *prout Curia conſideravit*, puts the Trial upon the Court; he cited *Yelv.* 58. & 1 *Bulſt.* 37. *Hale* ſeemed to think the Concluſion well enough; and that the *prout Curia conſideraverit*, is no more than putting it to the Judgment of the Court to direct the Trial of the Matter, as they think it ought by Law to be; be it by Jury or by the Court itſelf. *Sed Adjournatur.*

Cock againſt *Croſs.*

A. and *B.* were obliged jointly and ſeverally to *C.* and *A.* made *D.* his Executor, and died; *D.* made *C.* the Plaintiff, the Obligee, his Executor, and died. *C.* the Obligee brought Debt upon this Obligation againſt *B.* who pleaded that *A.* made *D.* his Executor, who made the Plaintiff his Executor; and that the Plaintiff had adminiſtered the Goods of *A.* not ſaying to the Value of the Debt, nor of what Value, but generally, that he adminiſtered the Goods of *A.*; hereupon the Plaintiff demurred and had Judgment, for the Bond being joint and ſeveral, though one of the Obligors be diſcharged in this manner, yet the Obligee may ſtill ſue the other if he hath not received a full Satisfaction by the Adminiſtration.

An Obligor makes the Obligee Executor, he ſues the other Obligor. Vide poſt, 80. Plowd. 180. Godb. 216. Heb. 10. Mo. 85. Yelv. 160. 1 Roll Abr. 940. 1 Leon. 90. Hutt. 28. 2 Jo. 345. Cro. Car. 572. Mo. 856 1 Chan. Rep. 292. 2 Mod. 315.

Term. Sanct. Hill.

ANNO

24 & 25 Car. II. in Banco Regis.

Cooker againſt *Child.*

Indenture of Charter-Party, not being *inter* Parties, covenants to pay to a Stranger to the Deed. S. C. 3 Keb. 24, 115. Vide 1 Lutw. 302, 303, &c. Nelſon's Lutw. 93, 165.

DEBT upon a Charter-Party indented, concerning Freight, by *Bently* the Maſter and Part-owner of a Ship, whereby he with Conſent of *Cooker* the other Part-owner, let the Ship to the Defendant for a Voyage, and for which the Defendant covenanted to pay *Bently* ſo much as Maſter, and covenanted with the ſaid *Bently, necnon cum prædict' Cooker*, to pay *Cooker* 300l. the Action is now brought: The Defendant demanded *Oyer* of the Indenture, which was entered thus: *This Indenture Charter-party witneſſeth, That* Bently, *Maſter and Part-owner of the Ship*, with the Conſent of *Cooker* the other Part-owner, lets the Ship, *&c.* and then follow the Covenants *ut ſupra*. The Defendant pleads, that only he and *Bently* were Parties, and ſealed and delivered the ſaid Charter-Party, and that the Plaintiff was no Party; upon this the Plaintiff demurred: And now it was argued by Sir *William Jones* for the Plaintiff, That this is not an Indenture between Parties, but only as a Deed-Poll, whereby the Party may covenant with a Stranger; for this is not between *Bently* of the one Part, and the Defendant on the other Part; in which Caſe none that is not Party can have an Action upon the Deed; but this here being in the Nature of a Deed-Poll, the Party

may

may covenant with other Perſons to do ſeveral other Acts, for which every one ſeverally may bring his Action. * According to *Coke* 2 *Inſt.* 673. and of that Opinion was the whole Court; who held the Declaration *per teſtat. Exiſtit.* well enough, though it be in Debt and not in Covenant, and that the Action was well, though brought by him only to whom the Debt is due; and gave Judgment for the Plaintiff.

* P. 75

Debt by Indenture *per teſtat. Exiſtit.*

Pybus againſt *Mitford.*

EJECTMENT upon the Demiſe of *Edward Grey*, of Lands in *Henton Norris in Comitatu Northumbriæ*; and upon *Non Culp.* and a Special Verdict the Caſe was thus: *Michael Mitford* ſeiſed of the Lands in Queſtion, and of other Lands. 23 *Jan.* 21 *Jac.* covenanted to ſtand ſeiſed immediately after the Date of that Indenture, to the Uſes of the Indenture, and to no other Uſes; and then limited the Uſes of the other Lands not in Queſtion, to the Uſe of himſelf for Life, Remainder to Truſtees till *Ralph* his Son by his ſecond Wife *Jane*, came to the Age of twenty one Years; and then to *Ralph* and the Heirs males of his Body, with divers Remainders over; and as to the Lands in Queſtion, to the Uſe of the Heirs males of the Body of the Covenantor by the ſaid *Jane*, the Remainder to his own right Heirs, *Proviſo*, That if *Robert* his Son by a firſt Venter, pay the Sum of 1200*l.* to his Truſtees, after the Death of *Michael*, and within five Years after he attains his full Age, for the Uſe of his younger Children, the ſaid Uſes to ceaſe. *Michael* died, leaving *Robert* his eldeſt Son by a former Venter, who entered, and by Indenture and Fine conveyed the Lands in Queſtion to the Uſe of himſelf and his Wife, and their Heirs, and died; the Wife married the Leſſor *Grey*, and they levied a Fine to the Uſe of the Leſſor; ſhe died 18 *Car.* 1. *Ralph* enters in 1644. and had Iſſue the Defendant and died and the Jury concluded, That if any Uſe aroſe to *Ralph* by the Deed of Covenant the 23d of *Jan.* 21. *Jac.* for the Defendant; & *ſi non*, for the Plaintiff. This Caſe was argued this Term by Sir *William Jones* for the Plaintiff, and by *Levinz* for the Defendant: And afterwards *Trin.* 26.

Covenant to ſtand ſeiſed to the Uſe of the Heirs males of his Body by a ſecond Wife, omitting himſelf, yet he ſhall take by Implication 8 C. 1 Vent. 372. Raym. 228, 218. 1 Mod. 98, 121, 159, 237. 2 Danv. 556. 3 Keb. 129, 239. 2 Mod. 207, 208, 209, 211. Co. Litt. 22 b. Hob. 30. 1 Roll. Abr. 616. Jac. 2. 1 Mod. 226, 237, 175. 2 Mod. 207. 1 Vent. 372.

by *Holt* Junior, after Chief Juſtice of this Court, for the Plaintiff, and by *Weſton* for the Defendant. And afterwards the ſame Term all the Judges, *viz. Hale, Twyſden, Rainsford* and *Wylde ſeriatim* delivered their * Opinions: And firſt it was argued for the Plaintiff, That this Covenant cannot inure to give an Eſtate for Life to *Michael*, ſo as to make the Eſtate limited to the Heirs of his Body by *Jane*, an Eſtate-Tail in *Michael* himſelf; as if it had been limited to him for Life, the Remainder to the Heirs males of his Body; but this is merely a future Covenant, that he will ſtand ſeiſed to the Heirs males of his Body, without any precedent Uſe to ſupport it like the Caſes 21 *H.* 7. 18, 19. *Dyer* 55. Covenants, That after his Death his Land ſhall remain and deſcend upon his Son; and *Hob.* 313. *Kibbet* v. *Lea*, & 1 *Co.* 119. *Winch* 61. *Secondly*, This cannot be good by way of future Uſe to the Heirs of the Body of *Michael*, for they ſaid, This is no more than a Contract, and the Contract of the Anceſtor cannot bind the Heir to that which the Anceſtor himſelf was not bound to; and *Michael* the Covenantor was not bound to raiſe any Uſe to *Ralph*, for the Uſe was not to ariſe till after the Death of *Michael*; and as *Michael* was not bound with the Uſe to *Ralph*, no more can *Robert* his Son and Heir be bound therewith; alſo it cannot be good to *Ralph* as a ſpringing Uſe by this Limitation to the Heirs males of the Body of *Ralph* by *Jane*; for if he takes it as a ſpringing Uſe, then he muſt take it as a Purchaſor, and that he cannot do; for he that takes by Purchaſe as Heir male, ought to be Heir and male, and ſo is not *Ralph* in this Caſe, for *Robert* is his Heir and not *Ralph*, and conſequently *Ralph* cannot take it this way. *Thirdly*, It was urged for the Plaintiff, That by the Words of the Covenant the Uſe is to riſe immediately after the Date of the Indenture, and therefore cannot ariſe after his Death. *Fourthly*, They ſaid, The Words of the Covenant are, to *ſtand ſeiſed to the Uſes in the Indenture mentioned, and no other Uſes*; and no Uſe is therein mentioned to *Michael*; and therefore no Uſe ſhall ariſe to him for Life by Implication to make this an Eſtate Tail in him; but the Deed as to the Uſes limited to the Heirs males of his Body by *Jane*, is void: To which it was anſwered by the Counſel of the Defendant, as to the firſt and fourth Objection,

* P. 76

Covenants to Uſes.
1 Lev. 171.
Ante 54. 55.
Poſt. 84.
2 Lev. 216.

Covenant to ſtand ſeiſed to the Uſes of an Indenture, and no other, will not exclude Uſes by Implication, but only expreſs Uſes.

jection, That here is a good Uſe raiſed by Implication to *Michael* for his Life; for of Neceſſity all the Uſe muſt be in ſome Perſon, and it cannot be in any other, becauſe no Uſe is limited to any other Perſon for the Life of *Michael*, therefore it muſt neceſſarily be in *Michael* himſelf for Life; and this is not like the Caſe of a Covenant, that * his Lands ſhall deſcend or remain after his Death, for there are no Words to ſtand ſeiſed, the want of which is the Reaſon of the Law in thoſe Caſe, as in 2 *Roll.* 788. *Sect.* 1. But here there are the Words *covenant to ſtand ſeiſed*, which always operates by way of raiſing Uſes, and never to give Actions of Covenant thereon, as it does in the other Caſes; and to have Uſes riſe by Implication is not a new Caſe, for *Moor pl.* 437. is ſo, ſo it was in *Fenwick* and *Mitford*'s Caſe, upon a Feoffment, and *Co. Litt.* 22. and ſo it was in the Lord *Paget*'s Caſe, 1 *Co.* 154. and 1 *And. pl.* 270. the Uſe limited to *Farmer* for the Life of the Lord *Paget*, was void, becauſe to a Stranger, but good to the Lord *Paget* himſelf for his Life by Implication, and 1 *Leon.* 102. *Allen* againſt *Palmer*. A Copyholder's Surrender to the Uſe of his Heirs, good, and as for the Words, *and to no other Uſes*, they are to be intended no other expreſs Uſes, and not to prevent Uſes by Implication, which are of neceſſity, where the expreſs Limitation of the Uſe is not full and perfect. As if a Man makes a Feoffment, or Covenant to ſtand ſeiſed to the Uſe of *J. S.* for Life, and to no other Uſes, yet ſtill the Reſidue of the Uſe muſt be in himſelf by Implication, for it cannot be in no Body, *Co. Litt.* 23. *a.* If a Man makes a Feoffment, and declares the Uſe for Life or in Tail, the Reſidue of the Uſe is to himſelf by Reſult or Implication: And as to the ſecond and third Objection, they anſwered, *Firſt*, That this Covenant binds the Land immediately (by the making of the Deed) in the Life of the Anceſtor; and though the Uſe does not ariſe till after his Death, yet the Land was bound with it immediately; and ſo it may be good as a future ſpringing Uſe after the Death of the Father, without any particular Eſtate precedent to ſupport it; As if a Man covenant after his Death to ſtand ſeiſed to the Uſe of *J. S.* and his Heirs, there being no Tranſportation of Poſſeſſion; in ſuch Caſe the Eſtate continues in himſelf during the mean Time,

* P. 77

Vide 2 Leon. 101. 3 Leon. 118.

Time, 1 *Co.* 154. *b.* A Feoffment to the Uſe of *A.* for Life, the Remainder to *B.* if *A.* refuſe, *B.* takes preſently, but if this had been by way of Covenant, *B.* ſhould not take till after the Death of *A.* but the Eſtate ſhall reſt in the Covenantor, becauſe he parted not with the Poſſeſſion, and therefore he ſhall have the Uſe in the mean Time; and the Word *immediately*, although in ſtrictneſs it excludes all mean Times, yet to make good the Deeds and Intents of Parties, it ſhall be conſtrued ſuch convenient Time as is reaſonably requiſite for doing the Thing; as the 18th of *Edw.* 1. 21. an
* P. 78 Award to * make an Obligation immediately to *J. S.* (then abſent) is intended ſuch a convenient Time as he can get to him; and 3 *Co. Butler* and *Baker*'s Caſe upon the Statute of *H.* 8. That the Anceſtor ſhall leave a third Part immediately to deſcend to the Heir, the Anceſtor deviſed ſo much to his Wife, that the third Part did not deſcend to the Heir; ſhe refuſed, and yet *Poph.* 89. by five Judges, her Refuſal made this Diſcent immediate; but for other Reaſons Judgment was there given againſt thoſe of this Opinion; alſo in this Caſe, the Land is immediately charged with the Uſe, though the Heir is not to have it till after the Death of the Anceſtor. And as to that Objection, That *Ralph* is not Heir to take by Purchaſe, they anſwered, We are here in the Caſe of a Uſe, where the Intent according to Equity muſt govern, for till the Statutes, all Uſes were determinable in Courts of Equity: and it appears here, that *Michael* intended that the Son by his ſecond Wife, was the Heir male of his Body. And the Lord *Cobham*'s Caſe was alſo cited, he ſettled Lands upon him, and the Heirs males of his Body, he was attainted of Treaſon, and afterwards it was enacted by Parliament, That the Heirs males of his Body, ſhould enjoy the Land; in this Caſe the eldeſt Son was allowed to enjoy it by the Intent of that Act, and yet he could not in Law be Heir to one attainted, the Attainder being not avoided by the Act. *Hale* Chief Juſtice, upon the firſt Argument held, That *Michael* took an Eſtate for his own Life by Implication, ſo that this was an Eſtate-Tail executed in himſelf. But if this had been otherwiſe, whether *Ralph* could take by Purchaſe as Heir male, being not Heir, he doubted; the reſt ſaid nothing. *Et adjournatur*: But afterwards it being argued again,

again, *Trin.* 26. he and all the other Judges gave their Judgment, and *Hale*, *Rainsford* and *Wylde*, held, That *Michael* took an Eſtate for Life by implication, and that this was an Eſtate-Tail executed in himſelf; as if the Eſtate had been limited expreſly to himſelf for Life, and after his Death to the Heirs males of his Body by *Jane*; and for that Reaſon gave Judgment for the Defendant: They relied principally upon the Lord *Paget's* Caſe, and upon *Fenwick* and *Mitford's* Caſe, 1 *Leon.* 256, 257, *Dyer* 310. 2 *Rolle* 788. And they held the Law ſo the rather in this Caſe, becauſe it is limited by way of Uſe, wherein the Intent is to be purſued; and by the *Proviſo* it appears plainly, That *Robert* the Son and Heir, ſhall not have the Land till he firſt pay the 1200*l.* to the younger Children by the ſecond Venter after the * Death of *Michael*. And now *Hale* held, That ſuppoſe the Eſtate had not been executed in the Father, yet *Ralph* the Son might take it by way of Purchaſe, as Heir male of the ſecond Venter, and this notwithſtanding the Rule in *Shelley's* Caſe and other Caſes, that an Heir generally to take by Purchaſe as right Heir, ought to be right Heir in Verity; for *Michael* here does in the ſame Deed take Notice, that he had another right Heir, *ſcilicet*, *Robert* by the firſt Venter, and yet therein limits the Eſtate to a Special Heir, whom he takes Notice is not his right Heir. Therefore the Special Heir by this Special Limitation, may take as a Special Heir, and that ſuch Special Heir was a Perſon of whom the Law took Notice before the Statute *de Donis*, *Fitz. tail* 23. 4 *E.* 3. 50. *Litt. Sect.* 352, 353. A Feoffment upon Condition to make an Eſtate-tail to Baron and Feme, and to the Heirs males of their Bodies, Remainder to the right Heirs of the Baron; Baron and Feme died before the Re-conveyance made, and the Gift was made to the Son and the Heirs males of the Father, and the Mother procreate, and yet theſe Words, and the *Heirs males of the Body of the Father and Mother*, make a Purchaſe. But as to this the other Judges, who agreed with him in the Judgment, ſaid nothing. But *Twyſden* Juſtice, held the Covenant void, and that no Uſe ariſes thereupon, but that the Deed was void in this particular, and that Judgment ought to be given for the Plaintiff. For *Firſt*, *Ralph* cannot take by Purchaſe, being not right

* P. 79.

Heir tho' not the very compleat Heir, may take as Purchaſor by the Intent of the Parties. Vide Owen 125, 148. Mo. 593, 666. Style 301, 307, 319. 1 Roll. Abr. 253. 2 Leon. 70. Cro. Car. 161. Cro. Eliz. 312, 840. 2 Lev. 60. 232. Raym. 330. Jo. 99. Owen 125, 148. 1 Vent. 324, 2 Vent. 311. 2 Mod. 286, 3 Lev. 127.

right Heir: Nor *Secondly*, by Diſcent, becauſe the Eſtate was not executed in the Father; and he ſaid, There could not be a Uſe by Implication, but where the Remainder is ſo limited, that by Poſſibility it may take Effect; and that if there be Incapacity in the Party, or if he refuſe, the Uſe is void, as it was in *Paget's* Caſe. Alſo he held, That Eſtates by Implication might be by Will, but not by Deed, as 13 *H.* 7. And as to the Intent it appears here, he had no Intent to take an Eſtate to himſelf for Life; for he covenants to ſtand ſeized to the Uſes there after mentioned, and to no others; and there is no mention afterwards of any Uſe to himſelf for Life. But by the Opinion of the other three Juſtices, Judgment was given for the Defendant. Upon which the Plaintiff immediately brought a new Ejectment; wherein *Levinz* was Counſel for him again, and thereby recovered ſome Part of
* P. 80 the Land, but upon *another Title; but no Writ of Error was brought by him upon the firſt Judgment, though he was diſſatisfied therewith.

Winſton againſt *Pinkeny.*

Leſſee ſurrenders, rendering Rent. S. C. Raym. 222. 3 Keb. 131, 137, 446, 488. 2 Danv. 501. pl. 13. 1 Vent. 242. 272. 2 Mod. 174. Vide 1 Lev. 144. Poſt. 88. Cart. 52. 1 Sid. 285. 2 Salk. 577. 2 Lutw. 1226. Nelſon's Lutw. 386, 387. And brings Debt upon the Contract before all the Days paſt. Vide 2 Danv. 501.

THE Caſe was, Tenant for Life made a Leaſe for Years; the Leſſee for Years by Parol without Deed, aſſigned his Term to the Tenant for Life, rendering Rent; and in Debt for this Rent the Queſtion was, Whether the Reſervation be good? For by *Bigland*, this here is a Surrender, and the Reſervation being without Deed, is void. But if it had been by Deed, it had been good by way of Grant. 12 *H.* 4. 17. 9 *H.* 6. 43. 1 *Cro. Peto* againſt *Pemberton*, *Dyer* 251. 2 *Rolle* 491. To which it was anſwered by *Leak*, although this be not good as a Rent, becauſe there is no Reverſion, yet it is good by way of Contract as a Sum in Groſs. To which *Bigland* replied, then Debt lies not till all the Days are paſt. *Et per Hale*, Though this Aſſignment by operation of Law turns to a Surrender, yet it is not an expreſs Surrender; and if it be not good by way of Reſervation, it is good by way of Contract; and ſo by Aſſent of the other Juſtices, gave Judgment for the Plaintiff, though all the Days were not paſt.

Cornel

Cornel againſt *Liſſet.*

DEBT for Rent, and lays the Action in *London*, ſuppoſing the Leaſe to be there made, of Lands in *Oxfordſhire*, and that the Leſſee entered and died; and the Defendant entered as Executor, and the Action was brought in the *Debet* and *Detinet*; and upon Demurrer to the Declaration, Judgment was given againſt the Plaintiff, for though the Defendant is ſued as Executor, he is charged as Aſſignee in the *Debet* and *Detinet* upon the Privity of Eſtate, not upon the Privity of Contract; and therefore the Action ought to be brought where the Land lies. *Levinz* for the Plaintiff, & *poſtea Hill.* 5 *W.* & *M.* was the like Caſe, and the like Judgment entered. *Hill.* 5. *Rot.* 31.

Debt for Rent againſt an Executor in the *Debet*, muſt be brought where the Land lies. 1 Vent. 238. 1 Sid. 240, 266. 1 Saund. 238. Vide 3 Lev. 74. 1 Lev. 128. 130, 224, 250. 1 Sid. 226, 343. Palm. 116.

* *Abbot* againſt *Chapman.* * P. 81

ASSUMPSIT for Money promiſed upon the Marriage of his Daughter, and upon *Non Aſſumpſit* a Trial at *Guild-Hall* before *Hale*. The Defendant gave in Evidence a Diſcharge of the Contract, but *Hale* ſaid, He ſhould have pleaded *Exoneravit*, yet he allowed it in Mitigation of Damages.

In *Aſſumpſit Exoneravit* muſt be pleaded, cannot be given in Evidence.

Doe againſt *Parmiter.*

TRESPASS for taking his Beaſts: The Defendant juſtified by Virtue of a Plaint levied in a Hundred-Court by the Plaintiff againſt *J. S.* upon which *taliter proceſſum fuit*, that the Plaintiff was Nonſuit, and Coſts taxed, and a Precept to levy it; upon which he took the Beaſts, and traverſes *(abſque hoc)* that he was guilty *ante deliberationem præcepti* or after the Return, upon this the Plaintiff demurred. And now *Holt* junior argued, That this ſhort way of pleading a Judgment in inferior Courts, is not allowable. *Sed non allocatur*, for this is well enough; ſetting forth that a Plaint was levied, but in pleading it they ought not

Judgment in an inferior Court pleaded that a Plaint was levied & *taliter proceſſum fuit.* S. C. 3 Keb. 127, 128. Poſt. 93.

not to begin at the Judgment, *ſcilicet quod conſiderat. fuit. Secondly*, He objected, That the Execution in the Hundred-Court was by *Diſtringas*, and not by *Levari facias*, and cited ſeveral Books to this Purpoſe; *Sed non allocatur*, for theſe Books where they ſpeak of a *Diſtringas*, muſt be underſtood of a *Levari facias*, for a *Diſtringas & ſic in infinit'* would be endleſs in an Execution. *Thirdly*, The Traverſe is not good, and therefore the Iſſue thereupon makes a Jeofail, for he hath taken Execution before the Precept delivered to him; had it been after the *Teſte*, it had been good, as was lately adjudged in this Court, therefore the Traverſe ſhould have been before the *Teſte*, or after the Return; *Sed non allocatur*, for the Traverſe is in prejudice of the Defendant himſelf, if it be taken more narrow than it need, and not to the prejudice of the Plaintiff. *Fourthly*, There is no Statute gives Coſts in this Caſe, but 23 *H.* 8. and 4 *Jac.* and thoſe are when the Plaintiff is nonſuit after Appearance; now here it does not appear there was any Appearance. * *Sed non allocatur.* For Advantage cannot be taken of this by pleading, but by Writ of Falſe Judgment, and the Judgment ſhall be intended good till it be avoided.

Execution in inferior Courts *per levari facias.* Vide 1 Salk. 201. Farſ. 1. & 44.

Traverſes, &c. between the delivery of the Writ and the return of it.

* P. 82

Judgment erroneous cannot be taken Advantage of in pleading, but by Error.

Dacres againſt *Dunkin.*

TROVER, the Defendant pleaded in Abatement, That the Plaintiffs *Hegham* and *Penrice* brought another Action for the ſame Goods, which is ſtill pending, the Plaintiff replied, That *Hegham* and *Penrice* are dead, whereupon the Defendant demurred; and now *Raymond* for the Defendant ſaid, That the Death of one Plaintiff in Trover does not abate the Writ, becauſe the Property of the Goods ſurvives, and to this Purpoſe he cited 2 *Bulſt.* 262. *Spring* againſt *Barret*, *Curia contra*: In all Action the Death of one Plaintiff abates the Writ, but in Treſpaſs the Death of one Defendant abates not the Writ, and Judgment that he ſhould anſwer over. But *Wylde* made ſome Doubt, If this Replication were not double in aſſigning the Death of two Plaintiffs in Abatement, when the Death

Death of one Plaintiff abates the Writ in all Caſes, but Death of one Defendant in Treſpaſs does not abate. S. C. 3 Keb. 127. 1 Lev. 165.

Plea in Abatement, the two Plaintiffs are dead, is not double.

Death of one abates the Writ as well as the Death of two? But by *Hale*, This is not double.

The *King* againſt *Gregory*.

DEBT by the King thus: *Memorandum Coram Domino Rege venit Dominus Rex, &c. & inde producit ſectam*, The Defendant pleaded the King had no Superior in his Realm, thereupon it was demurred; and now *Saunders* urged, That the Declaration ſhould be in the Name of the Attorney-General, *& unde Attornat. General. pro. Domino Rege dicit, &c.* Sir *William Jones* for the King, cited *Raſt. Entr.* 655. *b.* a Caſe in Point like this. And *per Hale* Chief Juſtice, This is but an unmannerly way of declaring for the King, *& adjournatur*. But afterwards in *Hilary* Term the Declaration was adjudged good.

Declar. *quod Dominus Rex venit coram Domino Rege* allowed. S. C. 3 Keb. 127.

* *Bedingfield* againſt *Berisford*.

* P. 83

ERROR of *Aſſumpſit* in the Court of *Lime Regis*, *Firſt*, That the Award of the *Venire facias* is *per quos rei veritas melius Scire poterit* for *Sciri*. *Secondly*, In the Entry of the Jury it is *qui electi, triati & jurati dicunt ſuper Sacramentum ſuum*, omitting *ad veritatem de infra content. dicend.* 1 *Roll.* 766. *Lit. p.* And for theſe Reaſons the Judgment was reverſed, upon the Motion of *Levinz* for the Plaintiff in Error.

Scire for *Sciri*. S. C. 3 Keb. 128. Vide 1 Vent. 241. Lutw. 954. 1 Sid. 406. 1 Keb. 554. *Ad veritat. dicend.* omitted in ſwearing the Jury.

Termino

Termino Paſchæ,

ANNO

25 Car. II. in Banco Regis.

Whaley againſt *Greenfield.*

Tenant in Tail covenanted to ſtand ſeiſed to the Uſe of himſelf for 99 Years, if he ſo long liv'd, Remainder over, and then levied a Fine, the Remainder is made good. Vide ante 55, 76, 77, &c. 2 Show. 4, 5.

EJECTMENT: Upon Evidence to a Jury at Bar, the Caſe was: Tenant in Tail covenanted to ſtand ſeiſed to the Uſe of himſelf for ninety-nine Years, if he ſo long lived, the Remainder to his firſt Son in Tail, the Remainder over; then he levied a Fine to another: And whether this Fine ſhall make good the Eſtate-Tail limited by the Covenant, or ſhall inure to the Conuſee? was the Queſtion; for by *Hale*, the Tenant in Tail does not here limit the Eſtate to himſelf for Life, but for Years; and therefore this is not like *Blithman*'s Caſe, 3 *Cro.* 279. nor *Beddingfield*'s Caſe, *ibid.* 895. where the firſt Eſtate being to himſelf for Life, is all the Eſtate he had power to diſpoſe of: But here by the firſt Limitation he diſpoſes to himſelf only an Eſtate for Years, ſo that the Remainder to his Son may well enough ariſe out of the Reſidue of the Eſtate-tail, which he during the reſt of his Life, has Power to diſpoſe of; ſo this is a Remainder executed in the Son, corroborated by the Fine; like to *Duncomb* and *Wingfield*'s Caſe in *Hob.* where Tenant in Tail bargained and ſold, and then levied a Fine to another, the Eſtate of the Bargainee is hereby corroborated. This Matter was deſigned to be found ſpecially: But afterwards upon the Evidence the Deed appeared to be forged, being

A Deed found to be forged after it had been found ſpecially, and unqueſtioned for 66 Years. Vide 2 Show. 5.

being indeed the ſame upon which the Special Verdict between *Whaly* and *Tankard*, was before found. See before, *pag.* 55.

* *Gunter* againſt *Cleyton*, at *Guild-Hall.* * P. 85

CASE, That whereas he had good Cauſe of Action againſt *A.* and ſued out a *Latitat* againſt him, the Defendant being Sheriff, arreſted him, and then ſuffered him to eſcape, and returned *Non eſt inventus*; and upon the Evidence before *Hale*, the Plaintiff was nonſuit. *Firſt*, Becauſe he could not prove any Cauſe of Action againſt *A.* which *Hale* held neceſſary to be done; but if he had declared of a Cauſe of Action for 40*s.* and upon Evidence had proved but 30*s.* that had been ſufficient (*quære tamen* it being Special.)— *Secondly*, Becauſe he declares upon a *Latitat in placito tranſgreſs.* and the Writ produced is *in placito tranſgreſſionis ac etiam Billæ* 20*l.* which *Hale* held a Fault incurable, & *poſtea* in the ſame Term, and in the ſame Court, between *Cuſe* and *Mildmay*, in Debt upon a Sheriff's Bond, conditioned to appear and anſwer *in placito debiti*, Judgment was given againſt the Plaintiff upon Demurrer, becauſe the Writ was *in placito tranſgreſ. ac etiam billæ*, for this Writ is not *de placito debiti tantum.*

Caſe for eſcape upon Arreſt, muſt ſhew Cauſe of Action.

Declares of a Cauſe of Action for 40*s.* and proves 30*s.*

Declares upon a *Latitat* in Treſpaſs, when it was Treſpaſs *ac etiam.*

Miller againſt *Green.*

TROVER among other Things *de duobus albis nodis*, Anglice *White Knots*, & *aliis parvis tæniolis*, Anglice *ſmall Ribbons:* After Verdict for the Plaintiff it was moved in Arreſt of Judgment, That *aliis parvis tæniolis* is incertain, and therefore Judgment was ſtayed, for it does not appear *quanta vel quales fuerunt. Withens* for the Defendant, *Levinz* for the Plaintiff.

Trover *de duobus nodis & aliis parvis tæniolis.*

Vide 3 Lev. 18, & 336. 2 Lev. 11. & 176, &c. ib. 1 Danv. 24, 25. Stra. 738, 819, P. C. 340.

827. 2 Hawk.

Dive

Dive againſt *Jenman.*

Declares that he did not do according to the Statute, and does not ſhew in Fact what the Statute required. 8. C. 3 Keb. 142, 151.

COVENANT, and ſays the Defendant covenanted to build him a Houſe, *ſecundum Regulas præſcriptas per Statutum pro reædificatione Londini*; and aſſigns for Breach, That the Defendant did not cover the Cantilivers with Lead *ſecundum Regulas præſcriptas per Statutum prædictum*, Judgment by Default, and a Writ of Enquiry, and 15*l.* Damages. It was *moved in Arreſt of Judgment, That the Breach was not ſufficiently aſſigned, for want of alledging in Fact, That the Cantilivers by the Act ought to be covered with Lead; *Sed per Hale*, It being ſaid, that he did not cover them with Lead, *ſecundum Regulas per prædictum Statutum præſcripti*. it is an Averment that ſo the Statute preſcribed. *Levinz* for the Defendant.

* P. 86

The *King* againſt the Corporation of *Winchelſea.*

Upon a *Certiorari* to remove Orders to the *Cinque Ports*, they returned *breve Domini Regis non currit, &c.*

CERTIORARI was directed to the Mayor and Jurats and Commonalty, to remove Orders by them made againſt Proprietors of Lands for Reliſf of the Corporation. They returned, That Time out of Mind, *&c.* there have been five ancient Vills, *Seddiet, Haſtings, Dover, Sandwich, New-Romney* and *Hithe*, called the *Cinque Ports*; and that Time out of Mind *Rye* and *Winchelſea* have been Members thereof. And that Time out of Mind, *&c. Brevia Domini Regis, &c. non currunt nec currere debent ſeu conſueverunt*, ſave only in Matters touching the Perſon of the King, Felony, or Appeals, and their Return was adjudged inſufficient; for this Court is to ſee that the Subjects be not injured in their Eſtates as well as in their Perſons, 2 *Cro. Brown*'s Caſe, *Habeas Corpus* or *Mandamus* lies thither: And by theſe Orders they have impoſed Levies upon the Eſtates of the Tenants; and if ſuch Orders be not examinable here, they would be equal to Acts of Parliament; and this Caſe is not merely civil between Party and Party, but between the Corporation and Party. Alſo the Return here was not poſitive, but

under

under a *cumque* by way of recital of their Privileges. Upon this the Return was quashed, but no Fine for Contempt, because they submitted to make Return of the Fact. *Levinz* for the King.

Shaw against *Stoughton.*

Divers Probats and Administrations where Goods are in several Provinces or

IT was said by *Hale*, and not denied, That if a Man die, leaving Goods in the several Provinces of *York* and *Canterbury*, several Administrations must be committed. And so it is of Goods in *England* and *Ireland*.

in several Realms. S. C. 3 Keb. 163. Vide 1 Lev. 78. 1 Roll. Abr. 908, 909. Hard. 216. 2 Leon. 155. Cro. El. 283, 345. Went. 46. Swinb. 357.

* *Bromfield* against *Teigh.* * P. 87

Distress is incident to a Drift of Common. S. C. 3 Keb. 163.

TRESPASS for taking and detaining his Beasts till five Pounds paid for their Deliverance. The Defendant justified, for that he had a Drift of Common to see that the Common was not surcharged, and that these Beasts were a Surcharge upon the Common, for which he took them and detained them till the five Pounds paid in Satisfaction of the Trespass. The Plaintiff demurred, and by Sir *William Jones*, the Prescription for a Drift of Common, does not of itself warrant a Distress thereupon, unless he had also prescribed to distrain. *Curia contra*, It is a Thing of common Right for Preservation of the Common; and gave Judgment for the Defendant.

Hanslip against *Coater.*

Indebitatus infra jurisdictionem for Wares sold, and does not say sold *infra jurisdictionem.* S. C. 3 Keb. 164. Vide 1 Lev. 30, 69, 96, 1 Jo. 230.

ERROR of a Judgment in an inferior Court, in an *Assumpsit* for Wares sold, because it only laid an *indebitatus infra Jurisdictionem* for the Wares, but did not say they were sold *infra Jurisdictionem*; and upon the multitude of Precedents so adjudged, the Judgment in this Case was reversed; but otherwise *Hale* and *Wylde* held it might be well enough.

105, 137, 156, 208. Raym. 75. 1 Vent. 2, 73, 243. 1 Sid. 331. 1 Mod. 32. 2 Mod. 141. Danv. 361. 2 Show. Cas. 450.

Randal

Randal againſt *Writtle.*

Rent out of Gavelkind ſhall deſcend as the Land. 8. C. 1 Mod. 96. 3 Keb. 165. 2 Danv. 549. pl. 5. Vide 2 Danv. 548. 549. 2 Roll. Abr. 780. pl. 6. Noy 15. Cro.

THE Queſtion was, If a Rent granted out of Land Gavelkind in *Kent*, ſhould diſcend to all the Males equally, as the Land itſelf out of which the Rent iſſued? And the Court held ſtrongly, That it ſhould. But upon the Motion of Serjeant *Hardres*, to be farther heard to the contrary, it was adjourned; but in *Michaelmas* Term following it was adjudged upon Argument, That the Rent is of the ſame Nature with the Land, and ſhall deſcend equally to all.

Car. 411. Cro. Jac. 498. 6 Mod. 120. 1 Salk. 243. Poſt, 138, 139.

* P. 88

* *Diſdale* againſt *Iles.*

Leaſe at Will, Leſſor makes a preſent Leaſe to another, but agrees that he ſhall not enter till after the Day the Rent upon the firſt Leaſe is due, the Leaſe at Will is determined. Raym. 224. 1 Vent. 247, 248. 3 Keb. 166, 207. Q. 1 Lev. 144.

DEBT for Rent againſt Tenant at Will; the Caſe was, The Plaintiff after he had made a Leaſe at Will, made a Leaſe for Years to commence preſently; but it was agreed between the Leſſor and the Leſſee for Years, that he ſhould not enter till after the Day, upon which the Rent of the Leaſe at Will was due. And whether this Leaſe and Agreement determined the Eſtate at Will, ſo that the Action lay not againſt the Tenant at Will? was the Queſtion; and after ſome Argument the Court doubted, and adjourned the Cauſe. *Sed poſtea Mich. eodem anno* it was adjudged, That the Eſtate at Will was determined, and that the Action lies not againſt the Tenant at will.

Ante 80.

Harlow againſt *Bradnox.*

Want of averring Life cured by thoſe Words, *in aretro exiſten'*. 3 Keb. 166. *Vide ante* 50. *Nelſon's* Lutw. 386, 387.

REPLEVIN, The Defendant makes Conuſance as Bailiff to Baron and Feme, he being ſeiſed in Right of the Feme, for Rent *in aretro exiſten'* the Plaintiff demurred Specially, becauſe it is not averred that the Wife is alive. *Hale:* The *in aretro exiſten'* is *quaſi* an Averment of the Life of the Wife; which after Verdict, or upon general Demurrer, would queſtionleſs be good, but this being upon a Special Demurrer he doubted. *Twyſden* and *Wylde* held it well enough, though upon a Special Demurrer; whereupon Judgment was given for the Avowant.

Term.

Term. Sanct. Trin.

ANNO

25 Car. II. in Banco Regis.

Davis againſt *Leving*.

Inhabitants of a Market may ſell in another Marke, notwithſtanding the Statute of P. & M.

IT was adjudged upon Demurrer, That the Inhabitants of one Market-Town may ſell Goods in another Market-Town, and are not prohibited by the Statute of *Philip* and *Mary*, which extends only to thoſe who live in Country Towns, and come and ſell their Goods in Market-Towns.

Term. Sanct. Mich.

ANNO

25 Car. II. in Banco Regis.

Semine againſt *Semine.*

Citation to repeal Adminiſtrat on, but the Grant affirmed, upon which an Appeal was ſued, and both Sentences repealed. A Leaſe made by the firſt Adminiſtrator in the mean Time, good. 8. C. Raym. 224. Vide ante 55, 86. poſt, 173, 182. 1 Brownl. 51, 91. 1 Roll. Abr. 919.

ADMINISTRATION was granted, and the Adminiſtrator by virtue thereof being poſſeſſed of a Term, made a Leaſe of the Land, and after was a Citation to repeal the Adminiſtration, but it was affirmed; upon which Sentence of Affirmation an Appeal was ſued, and the Sentence of Affirmation thereby repealed, and the firſt Adminiſtration repealed, and Adminiſtration granted to another. And by *Hale* and the whole Court, This new Adminiſtrator ſhall not avoid the Leaſe of the firſt Adminiſtrator, for this is only a Repeal of the Sentence in the Citation, and ſo is in the Nature of a Suit on the Citation; and ſo it is all one as if the firſt Adminiſtration had been avoided in the Suit upon the Citation, and not as if the Appeal had originally been brought upon the firſt Adminiſtration, which thereby had been totally annulled. 6 *Co. Packman's* Caſe.

Style 10. Yelv. 83, 125. 6 Co. 18. Mo. 396. Cro. El. 459. 1 Sid. 280, 293, 372. 1 Lev. 157. 186, 305. 1 Mod. 62, 214. 2 Saund. 148. 1 Wood's Conv. 917. 2 Atk. 285.

* P. 91

* *Wilſon* againſt *Robinſon.*

Deviſe of my Tenant-right Eſtate, the Fee paſſes and not the

EJECTMENT of Lands in *Underbarrow* in the County of *Weſtmoreland*, and in a Special Verdict upon Not guilty, the Caſe was, *William Baldwinſon* ſeiſed

ſeiſed in Fee of Tenant-right Lands there, made his Will in theſe Words: *I deviſe to my Couſin* William Baldwinſon, *all my Tenant-right Eſtate at* Brigiſend *in* Underbarrow, *with all that I and my Father took of* Rowland Hubberty, *of his Majeſty's Lands, and the Marqueſſes Fee, with all my Lands at* Becklide. Item, *I give* 30s. per Annum *for ever to the Parſon, and* 20s. per Annum *for ever to the Poor of* Underbarrow. And what Eſtate ſhould paſs by this Deviſe of Tenant-right Eſtate, whether an Eſtate for Life or in Fee? was the Queſtion: For it was objected, that by the Words *Tenant-right Eſtate*, not the Eſtate in the Lands, but the Nature, Quality, and particular Kind of the Lands was deſcribed and ſpecified; as *all my Soccage*, or all my *Capite Lands*; for *Tenant-right* Lands differ from the Nature of *Fee-ſimple* at Common Law, being of the Nature of Copyhold ſinable, and as Copyhold paſs by Copy, ſo theſe paſs by Deed without Livery; but upon every Death or Alienation, the Tenant muſt be admitted as in the Caſe of Copyhold; alſo when he intends to paſs a Thing in Fee, he adds the Words *for ever*, as in the Caſe of the *Parſon* and *Poor*. 2. The ſubſequent Words, *with all that I and my Father took of* Hubberty, (What all?) not a Fee ſimple; but all the *King's Lands and the Marqueſſes Fee*; and the laſt Words, *with all my Lands at* Becklide, can paſs but an Eſtate for Life. And all is one intire conjunctive Clauſe, and therefore can paſs no more than an Eſtate for Life in any Part of it; otherwiſe were they ſeveral diſtinct Clauſes of Deviſe, as in 1 *Roll.* 844. *nu.* 1, 2. and *Moor. pl.* 153. But the Court held that the Fee of the Tenant-right Land paſſed in this Caſe; but becauſe it does not appear how many Acres there are of the Tenant-right Lands, and how many of the other Lands; ſo that the Court cannot be aſcertained of the Quantities, a *Venire facias de novo* was awarded.—*Levinz* for the Plaintiff, *Weſton* for the Defendant.

Land for Life. S. C. 1 Mod. 100. Vide 1 Roll. Abr. 834. 835. 844. Style 282, 293. 1 Leon. 156. Hob. 2. Godb. 207. Mo. 57, 873. 2 Saund. 308. 2 Jo. 107. 1 Mod. 100. 3 Mod. 45. 4 Mod. 89. 1 Show. 348. 1 Chan. Rep. 262.

* *Wildman* againſt *North*.

* P. 92

REPLEVIN, the Defendant juſtified and pleaded in Bar, That the Beaſts belonged to a Stranger, *abſque hoc* that they were the Beaſts of the Plaintiff. Upon this the Plaintiff demurred, becauſe this is only

In Replevin the Defendant may traverſe the Property in Bar or Abatement.

S. C. 1 Vent. 249.

Matter in Abatement, and not in Bar; and alſo it amounts to the General Iſſue. *Curia*, In Treſpaſs this would amount to the General Iſſue; but not in Replevin, and may be pleaded either in Abatement or in Bar. And there needs no Avowry *pro retorno habendo* in this Caſe, for the Goods being not the Plaintiff's, the Avowant muſt have a Return of them, 2 *Cro. Sakild* againſt *Shelton*; and Judgment was given for the Defendant.

Where no Avowry *pro returno habendo* is neceſſary. Vide 2 Salk. 5. Acc. 31 H. 6. 12. 39 H. 6. 35. Bull. N. P. 54.

Lougher againſt *Williams* in Scaccar.

Leſſee covenants with the Leſſor and his Executors, to repair, yet covenant lies for the Heir. S. C. 2 Danv. 235. H. 5. Vide ante 13, 26. Poſt, 124. 3 Lev. 189.

COVENANT as Heir, upon the Leaſe of his Anceſtor of Lands in *Glamorganſhire*, in the Time of Queen *Eliabeth*, for 99 Years; wherein the Leſſee covenanted with the Leſſor, his Executors and Adminiſtrators, to repair, and to leave the Premiſſes in repair at the End of the Term; and now the Heir brought this Action againſt the Executors of the Leſſee; whereupon the Defendant demurred. And now it was argued for the Defendant, That the Covenant being only with the Leſſor, his Executors and Adminiſtrators, the Action lies not for the Heir, *Richmond*'s Caſe, *Owen*'s *Reports*. To which it was anſwered That this is a *Covenant which runs with the Land, and goes to the Heir without naming him*; as *Spencer*'s Caſe, and the Dean and Chapter of *Windſor*'s Caſe, 5 *Co.* Alſo the Intent of the Parties appears to be, that the Covenant ſhould continue after the Death of the Leſſor, it being with him and his Executors, and therefore it does not determine by his Death, *Sacheverel* and *Frogat*'s Caſe, *Trin.* the 23d of this King in *B. R.* upon which Judgment was for the Plaintiff. *Seys*, Serjeant, for the Defendant, *Levinz* for the Plaintiff.

Ante 13.

* P. 93

* *Goſton* againſt *Sedgwick*.

Writ of Error in Parliament, not determined by a Prorogation of Parliament.

ERROR in Parliament of a Judgment in *B. R.* was determined by a Prorogation of the Parliament; and a ſecond Writ of Error was brought which alſo determined by a Prorogation in *November* this Term, till the 7th of *Jan.* next. And now a third Writ of Error

Error brought, and a *Superſedeas* moved for to ſtay Execution; and at laſt upon ſeveral Debates and great Search of Precedents, it was granted, the Prorogation here being to a Day certain, and no Term interpoſing. But by *Hale*, though the Writs of Error be abated by Prorogation without default of the Party, yet if a Term had interpoſed between the *Teſte* and Return of the Writ of Error, no *Superſedeas* could be awarded without ſhewing ſome apparent Error in the Record. Though Writs of Error are abated by a Prorogation without any Default of the Party. And *Wylde* held, That although a Term did interpoſe between the *Teſte* and Return of the firſt Writ of Error, yet a *Superſedeas* lies in this Caſe, becauſe the Writ of Error is determined by the Prorogation, without default of the Party. But afterwards it was declared by the Lords, and ſo the Law is taken to be at this Day, that a Writ of Error does not determine by a Prorogation of the Parliament.

Atkinſon againſt *Woodburn.*

TRESPASS *vi & armis* in the County-Palatine Court of *Lancaſter*. The Defendant pleaded in Bar a Recovery for the ſame Treſpaſs in a Court-Baron; upon which the Plaintiff demurred. And *Wylde* Chief Juſtice of Aſſiſe at *Lancaſter*, upon an Adjournment to his Chamber at *Serjeant's-Inn*; held it pleadable in Bar, 40 *E.* 3. 27. *a.* 7 *H.* 4. 15. *a.* 3 *H.* 4. 11, 12, 20. *Bro. Judgment* 16. *Sed.* 6 *Co.* 45. *a. contra*, and 5 *Co.* 62. *a.* That it is not pleadable in Abatement. But after Judgment was given for the Plaintiff: For Treſpaſs *vi & armis* lies not in inferior Courts; and therefore the Judgment there when the Action is *vi & armis*, is void; and if it be not *vi & armis* (in this Caſe) it is not the ſame Treſpaſs. But he held *ut ſupra*, that * Judgment in an inferior Court may be pleaded in Bar to an Action brought in a ſuperior Court, and he alſo held it pleadable in Abatement when it is for the ſame Cauſe. *Levinz* for the Plaintiff, *Weſton* for the Defendant.

Judgment in inferior Court pleadable in Bar or Abatement to an Action in ſuperior Courts Ante 81,

* P. 94

Edgebury

Edgebury againſt *Roſndale.*

Covenant to run for 100*l.* at one Time, and for 200*l.* more at another Time, is within the Stat of Gaming. Vide 4 Mod. 409. 5 Mod. 1. 4. 1 Lutw. 484. 1 Salk. 344. & Mod. 54. 279. & 1 Sid. 394.

DEBT upon Articles, whereby the Plaintiff and Defendant agreed to run a Horſe-race at *D. tali Die* for 100*l.* and that they ran, and the Plaintiff won. The Defendant pleaded the Covenants, whereby it was farther agreed, That at the Defendant's Requeſt the Plaintiff ſhould bring the ſame Horſe to run with the other Horſe at another Day and Place for 200*l.* more. And then pleaded the Statute of King *Charles* the Second againſt Gaming, *That if one loſe more at one Time than* 100l. *upon Tick, all Securities given for the Money ſhall be void.* The Plaintiff replied, That the Defendant did not requeſt him to run again at the other Day and Place: Upon which the Defendant demurred. And Judgment was given for the Defendant. For *Firſt*, That the firſt 100l. was not loſt, and then a new Security afterwards given to run a ſecond Match for more, as it was objected was the Intent of that Statute, which allows the loſing of 100l. upon Tick: And *Secondly*, Though the firſt 100l. and no more was loſt in this Caſe; yet here becauſe the Contract was for more than 100*l.* to be won or loſt upon Tick or Credit, the whole Bargain was void *ab initio*, and not made good by the Event ſubſequent, whereby it happens that no more is loſt *in toto* than 100l. and the Statute being made to ſuppreſs the Uſe of exceſſive Gaming, ſhall be conſtrued in the moſt extenſive manner that can be to anſwer that End.

* P. 95

* *Baker* againſt *Bulſtrode.*

Condition to make ſuch Releaſe as ſhall ſatisfy the Plaintiff's Counſel, Defendant muſt tender. S. C. 1 Mod. 104. Raym. 282.

DEBT upon an Obligation conditioned, to ſeal and execute ſuch a Releaſe as ſhall ſatisfy the Plaintiff's Counſel: The Defendant pleaded, That the Plaintiff did not tender him any Releaſe to ſeal; whereupon the Plaintiff demurred: And now upon hearing Sir *William Jones* for the Plaintiff, Judgment was given for the Plaintiff: For the Defendant in this Caſe was to tender the Releaſe to the Plaintiff's Counſel,

Counſel, to ſee if he approved and was ſatisfied with it; and the Defendant hath undertaken to do it. And this is not like to *Lamb's* Caſe, 5 *Co.* 22. *a.* 23. *b.* where the Condition is to ſeal ſuch a Releaſe as the Plaintiff's Counſel ſhall adviſe; for in that Caſe the Plaintiff is to procure his Counſel to draw the Releaſe, and then tender it to the Defendant to ſeal.

1 Vent. 255. 2 Danv. 39. pl. 33. Vide 2 Cro. 661. 1 Roll. Abr. 465. pl. 29. Moor 595, 596. 3 Mod. 191, 192.

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* Term. Sanct. Hill. *P. 96

ANNO

25 & 26 Car. II. in Banco Regis.

Prideaux againſt *Warne.*

REPLEVIN for taking the Plaintiff's Sail: The Defendant avowed as ſeiſed of the Manor of *Padſtow* in the County of *Cornwal*, and that between *Wadebridge* in the Pariſh of *Brecock* and *Slipper-point*, in the Pariſh of *Padſtow*, Time out of Mind has been a Key for lading and unlading of Merchandize; which Key he and all Lords of this Manor Time out of Mind, repaired, and there kept a Buſhel for meaſuring Salt and other Merchandize there, & *ratione inde* have had a Buſhel of Salt (computing to the Buſhel 24 Gallons) of every Ship bringing Salt between the ſaid *Wadebridge* and *Slipper-point*, to ſell, &c. as belonging to the ſaid Manor, and then lays a Cuſtom to diſtrain for it any reaſonable Part of the Tackle of ſuch Ship; and that a Ship of the Plaintiff's laden with Salt to be ſold, came there, and for not paying the Duty he diſtrained the Sails; the Plaintiff *proteſtando* that the Lords of the Manor had no ſuch Duty, & *proteſtando*, no Preſcription to diſtrain for it: He by his Plea confeſſes

Preſcription to repair a Key, and to have Toll of all Goods brought within the River, naught, *aliter* of all Goods landed within the Manor. S. C. 1 Mod. 104. Raym. 232. 3 Lev. 425. 2 Danv. 129. See 1 Mod. 48, 231. 3 Lev. 400, 424, 425.

ſeſſed the Defendant is Lord of the Manor, and that between *Wadebridge* and *Slipper-point*, Time out of Mind there hath been a Key as aforeſaid, and the Lords of the Manor have repaired it: But farther he ſays, That the River of *Padſtow* is ten Miles long, and the Manor of *Padſtow*, a ſmall Manor of the Extent of half a * Mile and no more upon the ſaid River, within which Manor the ſaid Key is; and that the Ship was brought to *Nude*, a Place upon the ſaid River *longe diſtans a mole prædict'*, *viz.* the ſpace of ſeven Miles. And traverſes *abſque hoc* that the Ship was brought to the ſaid Key, or any other Place within the Manor; hereupon the Defendant demurred, and Judgment was given for the Plaintiff; for the having and repairing of a Key within the Manor, cannot intitle him to Toll out of the Manor for Goods not brought to the Key, nor within the Manor, but to a Place ſo far diſtant from the Manor and from the Key; nor will the Repair of the Key and the keeping of the Buſhels ſupport the Preſcription of Toll for Goods brought to another Place, though upon the ſame River: But if this had been a Port, *Hale* ſaid, ſuch Preſcription within the Port, might be good; as it is in 21 *H.* 7. 16. *a.* and in the Port of *London*, and divers other Ports, where the Owners of the Ports have ſuch Preſcriptions: But *Trin.* 7 *W.* 3. *in Communi Banco, ſed intratur Hill.* 5 *W. & M. inter Criſpe & Belwood, quod vide poſtea.* A Preſcription for the Lord of a Manor to keep and repair a Wharf within the Manor, and by Reaſon thereof to have Toll of all Goods landed within the Manor, though not at the Wharf, was adjudged good; for originally the Lord was Owner of all the Lands of the Manor; and therefore this Preſcription was held good in reſpect of the Eaſement in landing the Goods upon his Soil which is in Nature of a Toll-traverſe; whereas this here is only in the Nature of a Toll through for paſſing in the River, which is the King's common Highway, and that without having a Port or other Intereſt in the River, or any Place where the Goods come. And though this Caſe of *Prideaux* and *Warne* was cited as an Authority in the Caſe of *Criſpe* and *Belwood*, in oppoſition to the Judgment there given; yet the Difference between them is manifeſt,

and

* P. 97

Vide poſt. 190, 191.

Preſcription for Toll of all Goods brought within the Port, good. Vide 1 Mod. 105, 251. 3 Lev. 424, 425.

and the Caſe of *Criſpe* and *Belwood* was adjudged *ut ſupra* by the whole Court of Common Pleas. *Jones* and *Levinz* for the Preſcription in the Caſe of *Criſp* and *Belwood*; and *Wright* and *Lutwyche* Serjeant *contra*. And in the Caſe of *Warne* and *Prideaux ſupra*. *Courtney* for the Plaintiff and *Pollexfen*, after Chief Juſtice of the Common Pleas, for the Defendant.

* The *King* againſt *Ballow* and *Norman*. * P. 98

THEY were found guilty of Clipping and Coining, and the Queſtion was, What Judgment ſhould be given againſt them? And it was reſolved by all the Judges in *England*, except *Vaughan* Chief Juſtice *de Com. Banc.* that in both Caſes the Judgment muſt be; *to be drawn and hanged* without *quartering*, according to *Coke*, 3 *Inſt.* 17. *b.* as to Coining; but contrary to him there as to clipping. And *Standf. pl. Cor.* 182. *f.* as to coining.

For clipping and coining, the Judgment is drawn and hanged. S. C. 3 Keb. 278.

Lomax againſt *Armorer*.

ERROR of a Judgment in Dower in the Town Court of *Newcaſtle upon Tine*, was aſſigned by *Levinz*, becauſe the Plea was held upon Plaint only, without Writ, and Pleas of Freehold cannot be held without Writ, 2 *Cro.* 101. no not by Cuſtom, *F. N. B.* 47. Yet here no ſuch Cuſtom is alledged for it. *Co.* 2 *Inſt.* 311. a Plea of *Detinue de Charters* cannot be held without Writ, *Britt.* 128. *b. Co. Entr.* 129. *Dower* in *London*, *per breve*. And as to Fines they cannot be levied in inferior Courts without the King's Writ. 44 *Edw.* 3. 28, 37. 50 *Aſſ.* 9. 3 *Cro.* 314. *Owen* 93. for thereby the King would loſe his Silver. But in ancient Demeſne Fines have been allowed good, becauſe theſe Courts were anciently the King's Courts. No Body being ready of the other Side; it was adjourned: But afterwards *Hill.* 26 & 27. the Judgment was reverſed.

No Plea of Franktenement without Writ. 3 Keb. 277.

Termino

Termino Paſchæ,

ANNO

26 Car. II. in Banco Regis.

Vanaſton againſt *Mackarly*.

Covenant to pay 8*l.* a Year *quarterly natim.*

COVENANT in *B. R.* in *Ireland*, where the Plaintiff declared, that he covenanted to ſerve the Defendant five Years, and the Defendant covenanted to pay the Plaintiff 83*l.* every Year *quarternatim*, viz. 20*l.* 15*s.* at *Michaelmas*, 20*l.* at *Lady Day*, 20*l.* 15*s.* at *Midſummer*, and 20*l.* 15*s.* at *Chriſtmas*, and aſſigns for Breach Non-payment of the whole. The Defendant demanded *Oyer* of the Indenture, which was entered as aforeſaid, ſaving that under the *viz.* it was 20*l.* at *Michaelmas*, and 20*l.* 15*s.* at *Lady-Day*. And Iſſue was taken that the Plaintiff did not ſerve the Defendant; and in the continuance of the Iſſue and Trial and *poſtea* the Entry was made thus: *Niſi Capitalis Juſticiarius prius venerit die Lunæ, &c. inter horas ſecundam & tertiam poſt meridiem*, and the *Poſtea* was, *die & loco infracontent' venerunt partes, &c.* and Verdict and Judgment was given for the Plaintiff, whereupon Error was here brought, and two Errors aſſigned. *Firſt*, The Variance between the Sums in the Declaration and the Indenture; and alſo that all the Particulars do not amount to 83*l.* but come 15*s.* ſhort, and without the Particulars as ſet forth under the *viz.* it will not appear how much was to be paid at one Day, and how much at another; nor is it ſhewn what the Quarter Days are, and the Word *Quarternatim* cannot ſupply that; neither

neither is it ſaid *quarternatim per æquales portiones.*— *Secondly*, The *Poſtea* ought to have been *tempore & loco infra content'* and not *Die & loco.* * But the Court anſwered and reſolved, That *quarternatim* ſupplies all this after Verdict, and that the Variance under the *viz.* does no harm; for *quarternatim* ſhall be intended the uſual Quarter Days, and that the Payments were to be by equal Portions; and though 83*l.* is not due, but the Duty is leſs by 15*s.* yet the Jury having given no more than is due, the Demand of more will not vitiate, though in ſome Caſes the Demand of leſs will hurt: And as to the ſecond it appears the Cauſe was tried and no Default, and therefore it ſhall be intended the Parties came at the Time and Place, Judgment affirmed. *W. Jones* for the Plaintiff in Error, *Levinz* for the Defendant.

* P. 100

Vide ante 4. Covenant and Demand more than is due, the Jury give leſs. Vide ante 4, & 57.

Drew againſt *Bayly.*

DEBT upon an Obligation to perform Covenants, and upon Special Pleading and Demurrer the Caſe was thus: One poſſeſſed of a Term for one hundred Years as Adminiſtrator, made a Leaſe for five Years, rendering Rent to him, his Executors and Aſſigns, and made the Plaintiff his Executor and died; and now in an Action brought upon this Obligation, and Breach aſſigned for Non payment of the Rent, the Queſtion was, Whether the Executor of the Adminiſtrator, or the Adminiſtrator *de bonis non* to the firſt Inteſtate, ſhall have the Rent? By *Cokeyen* it was argued for the Defendant, That the Adminiſtrator *de bonis non* ſhall have it as incident to the Reverſion which he has without Controverſy; and it is not like to *Co. Litt.* 46. *b.* where the Huſband poſſeſſed of a Term in Right of his Wife, makes a Leaſe for part of the Term, rendering Rent, in which Caſe the Executors of the Huſband ſhall have the Rent, although the Wife hath the Reverſion, for that is, becauſe the Wife is not Party to the Leaſe, which is the ſole Reaſon of that Caſe. And the Covenant here runs along with the Rent. *Gould contra*, he cited *Latch* 266, 267. a Caſe cited to be ſo adjudged, which being there marvelled at, *Jones* Juſtice then ſaid, Yes, Faith, it was ſo adjudged.

Adminiſtrator of a Term for 100 Years, made a Leaſe for five Years, rendering Rent, his Executor ſhall have the Rent, and the Adminiſtrator *de bonis non* the Reverſion. S. C. 1 Vent. 259, 275. 3 Keb. 298, 427, 475. Lex Teſtam. 247, 248. Vide Dyer 283, 316. Co. Litt. 46, 199, 182, 209. 1 Chan. Rep. 98.

adjudged. And *Gould* said, That this Case is all one with the Case of *Co. Litt.* for there the Wife is in paramount the Lease * by Survivor, and so here the Administrator *de bonis non* is in paramount the Lease of the first Administrator, as hath been often resolved, for which Reason he cannot have a *Scire Facias* upon a Judgment obtained by the first Administrator; which the whole Court agreed. And *Hale* said, The Executor of the Administrator shall have this Rent, but it shall be Assets in his Hands liable to the Debts of the Intestate, for which he shall be charged as Executor *de son tort*; whereupon Judgment was given for the Plaintiff.

* P. 101

Vide Dyer 371, 372. 1 Jo. 214, 385. Hob. 246. Style 225. Latch 266, 267. Cro. Car. 167. 2 Vent. 312. 1 Sid. 29. 1 Chan. Rep. 228. 2 Jo. 161.

And *Note*, In *Michaelmas* Term following in another Case between the same Parties, the same Point happened again, and the Court in *Hale*'s Absence doubted; and being moved again in *Trinity* Term, *Hale* himself then doubted, but after, as I was informed, that Case was adjudged (as here) for the Plaintiff.

Holms against *Taylor*.

Trover and *Assumpsit* in one Action, and Not guilty as to the Trover. S. C. 5 Keb. 264, 276, 296, 302, 385. Bull. N. P. 50.

ERROR of a Judgment *in Com. Banco*, where the Plaintiff in an Action joined *Assumpsit* and *Trover* by several Declarations; and Verdict and Judgment was for the Plaintiff in the *Assumpsit*, and for the Defendant in the Trover. And it was argued and held by *Hale*, That though by the Verdict the Causes are now become several, yet in as much as no such Action lay, the Declaration is naught *ab initio*, and the Judgment void: But *Twysden* doubted, if the Severance by the Verdict does not make it good, though it was bad at first. *Adjournatur*,

Nota, *Hardres* 166. in Battery by Baron and Feme for Battery to both, if the Defendant be found *Non Culp.* as to the Husband, this by the Opinion of *Bridgman* Chief Baron, is cured by the Verdict,

* *Hawkins* againſt *Mills.* * P. 102

ERROR of a Judgment in *Exceſter* Court, becauſe the Award of the *Venire facias* was *præcept' eſt per Curiam quod Venire Fac.* XII. in Figures. But being *Roman* Figures, the Court held it well enough, *aliter*, if it had been thus 12. in *Engliſh* Figures, and the Judgment was affirmed.

Roman Figures good in pleading, not *Engliſh*. S. C. 3 Keb. 301. 2 Hawk. P. C. 240.

Smith againſt *Neeſam.*

ASSAULT and Battery upon *Non culp.* was tried before *Hale* Chief Juſtice at *Guildhall*; the Jury found the Defendant guilty of the Aſſault only, and not guilty of the Battery. And *Hale* Chief Juſtice certified accordingly, to have the Opinion of the Court upon the new Statute: And whether the Plaintiff ſhould have full Coſts, or no more Coſts than Damages, which were ſmall? was the Queſtion; and upon the firſt Debate it was adjourned. But reſolved afterwards (as I heard) that he ſhall not have more Coſts than Damages, for the Battery is not certified to be fully proved, but the Aſſault only.

Where the Aſſault only is proved, no more Coſts than Damages. S. C. 3 Keb. 283, 292. 305, 335.

Brown againſt *Palfry.*

PROHIBITION to the Eccleſiaſtical Court of *Durham*, ſuggeſting that they are a Parochial Chapel within another Pariſh of *Northumberland*, and that the Inhabitants of the Chapelry have Time out of Mind had a Parochial Chapel and Divine Service, Sacraments, *&c.* and have uſed to be exempt from the Repair of the Parochial Church, Bells, *&c.* in Conſideration of their being charged to the Repair of their own Chapel, and that they have uſually repaired the ſame; and yet that the Defendant, Churchwarden of the Pariſh-Church, ſued them to repair the ſaid Church, the

Cuſtom to repair a Chapel, and to be diſcharged from repair of the Pariſh-Church. Vide poſt, 163, 164, 186, 187. 3 Burr. 1689. 3 Term. Rep. 107.

the Pariſh-Bells, &c. And the Prohibition was granted.

* P. 103 And at * another Day afterwards a Conſultation was moved for, for that this whole Matter was pleaded there, and Sentence given; and the Caſe of *Chapel Brimidge*, *Hob.* 66. was cited, wherein ſuch a Caſe a Conſultation was granted upon Motion. To which it was anſwered, That in the Caſe of *Chapel Brimidge* Sepulture was ſtill reſerved to the Pariſh Church, which was a Reſervation of the ancient Right, which is not in this Caſe. Alſo upon Examination by the Court, the Suggeſtion there was found falſe; and though it was decreed there againſt the Plaintiff in the Prohibition upon pleading the Cuſtom, yet it was to try a Matter there not within their Juriſdiction, for they could not try Cuſtoms; their Law and ours differing as to the Nature of Cuſtoms, *Latch.* 48. If a Cuſtom be alledged in the Eccleſiaſtical Court, and denied, a Prohibition lies, *Latch* 200, a *Modus* is ſueable there; but if denied, a Prohibition lies: The Bounds of a Pariſh are not triable there, 3 *Cro.* 228. adjudged, and *Hetley* 133. and 3 *Bulſt.* 241. a *Modus* was ſued for there, and another *Modus* pleaded, and a Prohibition granted. At laſt the Court ruled the Prohibition ſhould ſtand, which having before been granted abſolutely, a Conſultation cannot be upon bare Motion without Plea; and *Hale* and the Court ruled the Plaintiff ſhould declare upon the Prohibition, and the Defendant ſhould plead as he thought fit. Upon which he traverſed the Cuſtom which was tried at *Newcaſtle* Aſſizes, and the Jury found no ſuch Cuſtom; upon which a Conſultation was granted. *Levinz* Counſel for the Plaintiff in the Prohibition, *Weſton* for the Defendant. *Vide Trin.* 28 & 29. *B. R.* a Prohibition granted in a like Caſe, and 2 *Roll. Rep.* 265.

Vide poſt, 142. 1 Lev. 78. 4 Mod. 157, 158.

Oky againſt *Sell.*

Stat. 23 *H.* 6. is a general Law. Vide 1 Lev. 86, 209, 254. 1 Saund 161. 1 Sid. 383. Vent 237. 1. 464.

DEBT upon a Sheriff's Bond. The Defendant demands Oyer of the Condition, which was That the Defendant ſhall be a true Priſoner, and without pleading the Statute of 23 *H.* 6. he pleaded that he was in Execution for Debt, and yet this Obligation was given

given for Eaſe and Favour *pro libertate obtinen. & ſine ſatisfactione* of the Plaintiff: Hereupon the Plaintiff demurred, and upon the firſt Argument *Hale* Chief Juſtice held. *Firſt*, That the * Statute 23 *H.* 6. is a general Law, of which the Court muſt take Notice without pleading. 2. If it were not, yet this Obligation is void by the Common Law. *Sed adjournatur.*

* P. 104 Obligation to eaſe one in Execution, void at Common Law 1 Saund. 161, 162, 318. 1 Lev. 86, 209, 254. 1 Vent. 237. 1 Sid. 96, 384, 838. Hard. 464.

Sir *Richard Saltonſtall*'s Caſe. In the Common Pleas.

A MAN deviſed Lands to his Wife for Life, and that ſhe may diſpoſe thereof to any one of her Children ſhe pleaſes: And upon the firſt Argument *Vaughan* Chief Juſtice, and *Atkyns* held, That ſhe might give it in Fee: *Hugh Wyndham* and *Ellis*, that ſhe could not give it but for Life. But it was adjourned in order to be further argued. *Hoc ex relatione Servientis* Willimot.

Deviſe to his Wife, and that ſhe may diſpoſe of it to which of the Children ſhe pleaſes. S. C. 1 Mod. 189. Vide Latch 9, 39, 134. Moor 57. 1 Leon. 156. 2 Leon. 68. 3 Leon. 71, 115. 4 Leon. 41. 2 Jo. 107, 113, 137 2 Lev. 249. 1 Mod. 189. 3 Lutw. 762. 2 Show. pl. 28.

Term.

Term. Sanct. Trin.

ANNO

26 Car. II. in Banco Regis.

White againſt *Stringer.*

Commonly called Lord *Tenham's* Caſe.

Covenant in Conſideration of the Marriage of his firſt Son, to ſettle to him in Tail, Remainder to the ſecond Son, the Conſideration extends to the ſecond Son, and is not voluntary, nor void *quoad* Purchaſors. S. C. 3 Keb. 822.

IN Ejectment upon Not guilty, a Trial was at Bar; and upon Evidence the Caſe was: One ſeiſed in Fee in Conſideration of Marriage between his firſt Son and *A.* and of a Marriage-Portion to be paid, which was afterwards paid, made a Settlement to the firſt Son and the Heirs of his Body upon *A.* begotten, Remainder to his own right Heirs; the Father was then indebted. Three Years after the Father ſold the Lands for valuable Conſideration, and died: The firſt Son and *A.* died without Iſſue. And whether the Remainder limited to the ſecond Son be fraudulent and void *quoad* a Purchaſor, he having Notice of the Settlement, and a Covenant in his Deed of Purchaſe againſt all Incumbrances, ſave this Remainder to the ſecond Son, againſt which he had taken a collateral Security? was the Queſtion. Serjeant *Maynard* for the Plaintiff urged, That this was void as to the Purchaſor. For *Firſt*, The Conſideration of the Marriage, and the Portion, extends not to the ſecond Son, no more than if the Father upon the Marriage and for the Marriage-Portion, had ſettled it to the firſt Son and the Heirs of his Body; and after on the ſame Day had ſettled the Reverſion upon the ſecond Son in Tail, the Remainder to his right Heirs; this ſecond Settlement had been voluntary

voluntary and void as to Purchaſors. *2dly*, Though * there be Notice of the Settlement, and though it be excepted out of the Covenant, *&c.* in the Deed of Purchaſe; that will not alter the Caſe, for one that hath Notice of a fraudulent Deed, may ſafely purchaſe, knowing that cannot hurt him. But *Hale* Chief Juſtice, and *Wylde* held clearly, to which alſo *Rainsford* agreed, *dubitante Twyſden*; that though one and the ſame Deed may be upon good Conſideration as to one, and voluntary as to another in ſome Caſes, yet not in this. *Firſt*, It cannot be imagined that he intended to deceive a Purchaſor after the Determination of an Eſtate-tail, which might endure for ever, when the Conſideration of the Purchaſe, as well as the Remainder itſelf, by Reaſon of the firſt Eſtate-tail, was of ſo ſmall a Value. *Secondly*, The Purchaſor is not deceived in this Caſe, for he not only had Notice, but alſo collateral Security againſt this Remainder. Accordingly the Jury gave their Verdict, That the Remainder was not void, but good againſt the Purchaſor.

* P. 106 Purchaſor has Notice of ſuch Settlement and Security againſt it. Vide ante 21. Poſt, 152. 1 Lev. 48. 1 Mod. 86. 301, *&c.*

Mayor and Commonalty of *London* againſt *Deputee.*

DEBT, and declares that the Mayor and Commonalty Time out, *&c.* have had *Scavage* of all Ships that come into their Port, and that all their Cuſtoms are confirmed by Act of Parliament, *Rich.* 2. and that the Defendant in a Ship brought into Port ſo many Deal-boards, for which he ought to pay ſo much for Cuſtom as Scavage: The Defendant waged his Law, whereupon the Plaintiff demurred: And upon the firſt Argument the Court gave Judgment for the Plaintiff: The Action being founded upon a Debt ariſing upon Cuſtom confirmed by Act of Parliament, though *Co. Ent.* 118. was cited *contra.* In Debt for an Amercement in a Court-Baron, founded upon a Preſcription to amerce, *Ley-gager* lies: So *Beni.* 39. in Debt upon a By-Law, founded upon a Cuſtom to make By-Laws. And the Statute though it confirms their Cuſtoms, does not alter the Debt, but leaves that it was before, ſtill due upon the Cuſtom, as 2 *Cro. Bradſhaw*'s Caſe, Debts

In Debt for Scavage Ley [illegible]. 8. C. 2 Salk. 683, 684. 1 Show. 75. 3 Keb. 337. Poſt, 142, 174. 1 Lev. 15. Vide 9 Co. 87, 88. Q. 2 Roll. Abr. 106.

upon ſimple Contracts aſſigned to Creditors by Virtue of the Statute of Bankrupts, though in Debt for them the Defendant may wage his Law. But the Court ſaid, In the Caſes cited by Amerciaments upon By-Laws, the Debt is not immediately founded upon the Cuſtom, but upon the * Amerciament, by the By-Laws, &c. which by Cuſtom are warranted. But in this Caſe the Debt itſelf is immediately founded upon the Cuſtom confirmed by Act of Parliament. *Simpſon* for the Plaintiff, *Levinz* for the Defendant.

* P. 107

1 Lev. 14, 15.

Blackborne and his Wife, and *Anne Haigh*, againſt *Greaves* and others

Baron and Feme join, the Trover being before Marriage, the Converſion after. S. C. 3 Keb. 62, 263, 329.

TROVER for 200 load of Wood, and declares, that the Wives of the two Plaintiffs *dum ſolæ* loſt the Wood; and that after *Blackborn* and his Wife married, and the Defendants afterwards converted: Upon *Non culp.* a Special Verdict found, that *John Haigh* was ſeiſed of Copyhold Land where the Wood grew, and had Iſſue three Daughters the Defendants, by his firſt Wife; and the two Plaintiffs his Daughters, and *John* his Son by a ſecond Wife; and that he ſurrendered to the Iſſue of the ſaid three Daughters for eleven Years, Remainder to his two Daughters for five Years, the Remainder to the three Daughters by his firſt Wife, Remainder to his right Heirs. The Father died, the three Daughters were admitted, *John* the Brother died, the Years expired, the three Daughters entered and cut the Trees, and the Jury concluded, That if the Admittance of the Defendants was the Admittance of him in Remainder, for the Plaintiffs; if not, for the Defendants. And Judgment was given for the Plaintiffs, that the Admittance of the three Daughters was the Admittance of *John* the Brother in Remainder as right Heir, and ſo an actual Seiſin in him to make a *poſſeſſio fratris*, which makes the Land diſcend from him to the two Plaintiffs, his Siſters of the whole Blood, and not to all his Siſters as Heirs to their Father; the Authorities relied upon were 4 *Co.* 23. *a.* 3 *Cro.* 504. But then the Trover being laid before the Marriage, and the Converſion after, it was objected,

Admittance to a Copyhold of the particular Tenant, is the Admittance of him in Remainder, and makes a *poſſeſſio fratris*. Bul. N. P. 108. 1 Term Rep. 600.

objected, That Baron and Feme could not join, but the Baron ought to ſue without the Wife, for the Converſion is the Cauſe of Action. But the Court held it well with or without the Wife; for the Inception of the Cauſe of Action was in the Wife by the Trover, though not conſummate till the Converſion afterwards. *Levinz* for the Plaintiffs, *Weſton* for the Defendants.

* *Nota*, In a Caſe between *Powes* and his Wife againſt *Marſhal*, the Trover was before Marriage, and the Converſion after; and the Court was divided upon it, whether the Wife could join with the Huſband. *Twyſden* and *Wyndham* held ſhe ought to join. *Hyde* Chief Juſtice, and *Kelynge contra*, which Caſe is now reported 1 *Sid.* 172. But now all the Court agreed ſhe might join in this Caſe, or he might ſue alone, for the Reaſon aforeſaid. * P. 108

Cragg againſt *Norfolk.*

ASSISE for the Office of Serjeant at Mace to the Houſe of Commons, the Aſſiſe was arraigned, and Day given to plead; at the Day the Tenant took Exceptions to the Writ. *Firſt*, Becauſe it was *audiend'* for *ad audiend'*; *ſed non allocatur*, it may be *audiend'* as well as *ad audiend'*. *Secondly*, The Return of the Writ was *coram nobis apud Weſtmonaſterium*, whereas it ſhould be *ubicunque fuerimus in Angliâ*; for if the Court ſhould remove from *Weſtminſter*, the Tenant is not bound to appear. *Sed non allocatur*. So it was when this Court followed the King. Then the Day was appointed for the Trial; whereupon the Plaintiff made Title by a Patent from King *James* I. reciting a former Grant to another, and this to commence from the Determination thereof: *Per Curiam* reſolved, This Recital is not Evidence, whereupon he was forced to go to the *Rolls*, and procure the Maſter of the Rolls to let the Roll be brought into Court, which was done accordingly. Then being put to prove Seiſin, he proved only, that he went to the Houſe of Commons and demanded his Place, but received no Fees. But that in an Action of the Caſe for Diſturbance, he received 300*l.* Damages, and this was held a ſufficient Seiſin by ſome of the Judges,

Aſſiſe arraigned, and Day given to plead to the Writ. S. C. Poſt, 120.

A Writ *in B. R.* returned *coram nobis apud Weſtm.* not *ubicunque.*

Patents: Recital of a former Patent, no Evidence without producing the firſt Patent. Vide poſt 242. Bull. N. P. 227.

Recovery of Damages in Caſe for diſturbing him in his Office.

is not Seiſin to maintain an Aſſiſe.

Judges, the Damages being recovered in Satisfaction of the Fees while he was out of Poſſeſſion of the Office: But others were of a contrary Opinion, and ſo the Matter was intended to be found ſpecially: But afterwards the Plaintiff would not ſtand to that, but became nonſuit.

* P. 109

Nota, 1 *W. & M. in Communi Banco*, in an Aſſiſe for the Office of Maſter of the Wardrobe, which King *Charles* II. gave to the Lord *Mountague*, but after turned him out, and granted it to the Lord *Preſton*; whereupon the Lord *Mountague* * brought an Aſſize: It was held by the whole Court, That the Grant being in Reverſion as here, and reciting the former Grant, was not Evidence, upon which he was alſo forced to go to the Maſter of the Rolls, and procure him to ſend the Roll of the firſt Grant, which he did; and the Court in the mean Time ſtayed and proceeded in other Points of the Aſſize.

Lenthal againſt *Lenthal*.

Gaoler ſuffers a voluntary Eſcape in *A* who comes back to Priſon, and eſcapes again in the Time of a ſucceeding Gaoler, he is chargeable. S. C. 3 Keb. 437. Bull. N. P. 69.

DEBT againſt *William Lenthal*, Son and Heir of Sir *John Lenthal*, Marſhal of the King's Bench, for the Eſcape of one committed in Execution in the Life-time of his Father, by whoſe Death that Office deſcended to the Defendant; and alledges that he had him in Execution, and ſuffered him to eſcape; upon *Nil debet* the Cauſe was tried before *Hale* Chief Juſtice, and was thus: The Father ſuffered a Priſoner to make a voluntary Eſcape, the Priſoner came back in a ſmall Time after to Priſon, and there was actually in Priſon at the Death of *Lenthal* the Father; and ſo continued afterwards in the Son's Time, till he ſuffered him to eſcape again: And whether he ſhould be charged for the Eſcape in his own Time, after a voluntary Eſcape before ſuffered by his Father? was the Queſtion: For it was urged for the Defendant, That after the voluntary Eſcape by the Father, he could not take him again in Execution, though the Party himſelf might, if done without his Conſent; and though he returned to Priſon, yet he was not thereby a Priſoner, neither could either the Father or the Son detain him there. But for the Plaintiff it was ſaid, that it might be very miſchievous,

if

if he ſhould be allowed to excuſe himſelf in ſuch a manner, for the Marſhal commonly ſuffers Priſoners in Execution to go out upon Security, and when he is ſued for Eſcapes, he pleads freſh Purſuit and Recaption; and ſo they go out and return at their Pleaſure; and if the Succeſſor might thus excuſe himſelf, by ſaying, That his Predeceſſor ſuffered the Party to make a voluntary Eſcape, though the Succeſſor had him actually in Priſon, all the Creditors in *England*, of Priſoners committed in the Time of a former Gaoler, may be thus cheated; for it will be eaſy for the Succeſſor to prove a voluntary Eſcape * by his Predeceſſor, though the Creditor may not prove it voluntary; Upon this the Matter was found Specially, as was alſo the ſame Point between other Parties the ſame Term. And *poſtea Trin.* 27. upon Conſideration of 1 *Roll.* 902. Lord *Robert*'s Caſe, and *Hob.* 202. Sheriff of *Eſſex*'s Caſe, the Court, having as they ſaid, conſidered the Matter, *ſcilicet*, *Hale*, *Twyſden*, *Wylde* and *Rainsford*, without Argument at Bar, gave Judgment for the Plaintiff in this Caſe of *Lenthal* and *Lenthal*.

* P. 110

Brown againſt *Collins*.

THE Sittings after the Term this Caſe was tried before *Hale* at *Guild-hall*; an Executor waſtes the Goods of his Teſtator, and died, leaving Aſſets, and this Defendant his Executor: And whether the Defendant ſhould be charged *quoad* theſe Aſſets? was the Queſtion: And *Hale* held the *Devaſtavit* to be a perſonal Tort, which died with him that did it. But upon the importunity of *Saunders*, of Counſel for the Plaintiff, he ſuffered it to be found Specially. And afterwards *Paſch.* 27. *Car.* 2. it was adjudged by the whole Court according to this Opinion of *Hale*.

Executor waſtes, and dies, his Eſtate is not chargeable for this *Devaſtavit*. S. C. 1 Vent. 292. Vide 1 Lev. 146, &c. ſb. Ante 40. and Poſt, 133. contr.

Curtis againſt *Davis*.

ASSUMPSIT naming herſelf Adminiſtratrix of *J. S.* and declares that the Defendant was indebted to her 30*l.* but does not ſay he was indebted to her as Adminiſtratrix,

Adminiſtrator ſued for Debt *in proprio jure*, and for another.

Debt as Adminiſtratrix. S. C. Poſt, 228. Vide ante 20. 3 Vent. 268. Aleyn 74.

Adminiſtratrix. But then declares of another Debt due to her as Adminiſtratrix, and that upon Account between them the Defendant was found indebted to her in another 30*l.* which he promiſed to pay; upon *Non Aſſumpſit* a general Verdict was given, and entire Damages. Whereupon it was moved in Arreſt of Judgment, That the firſt Promiſe is, and muſt be intended of a Debt due to the Plaintiff *in proprio jure*, for * although ſhe names herſelf Adminiſtratrix, and in the End of her Declaration produces Letters of Adminiſtration, yet that is only to warrant the ſecond Declaration, which is *in jure inteſtati*. To which it was anſwered, That admitting the firſt Promiſe to be *in jure proprio*, yet the laſt being grounded upon an Account with herſelf, and the Promiſe made to herſelf in her own Time, both may be joined in one Declaration, and a general Verdict and entire Damages given; alſo it may well enough be intended after Verdict, that the firſt Debt was due to her as Adminiſtratrix, though it is not expreſly ſo alledged. To all which *Hale*, *Rainsford* and *Wylde* agreed, and gave judgment for the Plaintiff. *Twyſden totis viribus contra:* Upon which a Writ of Error was brought immediately. But I never heard what became thereof.

* P. 111

Vide Trin. 26 Car. 2. Hall v. Huſtam. Poſt, 188, 228.

The *King* againſt *Newton*.

Indictment for Trespaſs, Forgery and Publiſhing, found guilty *de Tranſgreſſ. & Forgeria prædicta*, the Publication included. Poſt, 221. In Counties Palatine Writs of Proceſs are directed to the Chamberlain, Indictments, &c. to the Judges.

INDICTMENT for forging and publiſhing a Deed at *Cheſter*, ſent to *Cheſter* and there tried, and found Guilty *de Tranſgreſſione & Forgeria præd.* And this was found to be inſufficient, for nothing is found as to the Publication. *Sed non allocatur: De Tranſgreſſione prædicta* includes it: As a Treſpaſs of Aſſault and Battery, Jury finds him guilty *de Tranſgreſſione & inſultu præd.*, this includes the Battery, and ſo it has been adjudged. Another Exception was, That the *Mittimus* was ſent to the Juſtices of Aſſiſe at *Cheſter*, and not to the Chamberlain as it ought: *Sed non allocatur*, it ought to be ſo in Writs of Proceſs, they are directed to the Chamberlain, to command the Sheriff to execute them, but not to command the Judges to try a Cauſe; for all Indictments, Informations, Records, &c. to be tried, are immediately ſent to the Judges in all Counties Palatine,

latine, and not to the Chamberlain, *&c.* See the like Caſe hereafter, *Paſch.* 30 *Car.* 2. *int. Regem* and *Marriot.*

* The *King* againſt the Inhabitants of the County of *Nottingham.*

* P. 114

Repair of a Bridge in *Nottingham*, tried in *Middleſex*.

INFORMATION was againſt them for not repairing a Bridge upon the *Trent*, between *Newark* and *Mansfield*, *Comitatu Nottingham*, which Time out of Mind they have and ought to repair: Two of the Inhabitants in Name of themſelves and the reſt, pleaded, That the Lord *Limington*, and other Perſons, Owners of certain Lands, called *Bridglands*, ought to repair it *ratione tenuræ*; *abſque hoc* that the Inhabitants of the County, Time out of Mind, have and ought to repair it: The Attorney General replied, That the Inhabitants ought to repair, *&c. abſquæ hoc* that the Lord *Limington* ought, and they rejoined, That the Lord *Limington* ought, *&c. ut ſupra*, and ſo Iſſue was joined: Upon which the Attorney General ſurmiſed, that all the Inhabitants are chargeable; and after Trial by an indifferent County, *per aſſenſum partium præceptum eſt Vicecom. Middleſex*, *&c.* Upon which a Trial was at Bar by a *Middleſex* Jury, to try the Right of repairing this Bridge in *Nottinghamſhire*, who found the Defendants Guilty.

Two Inhabitants appear for them and the reſt.

Traverſe upon a Traverſe, the laſt tried, and the Defendant found guilty upon the firſt. Vide 1 Saund. 21, 22, 23. 1 Lev. 194. Poſt, 175. 1 Mod. 280.

Nota, This Record, Iſſue and Trial. *Firſt*, The Defendants did not plead *Non Culp.* but that another ought to repair, and traverſe that they ought, as *per Hale*, They muſt in this Caſe of a Bridge, that it may appear to the Court who ought to repair in Caſe they ought not. *Secondly*, A Traverſe taken upon a Traverſe, and the Iſſue joined upon the laſt Traverſe, that another ought to repair: And *Thirdly*, The Defendants nevertheleſs found Guilty upon this Iſſue, joining it to the firſt Traverſe, That they ought not to repair. And all this by the Direction of *Hale* Chief Juſtice, with whom the other Juſtices agreed.

Term.

Term. Sanct. Mich.

ANNO

26 Car. II. in Banco Regis.

Nelthorpe and *Farrington* againſt *Dorrington.*

Three Joint-Tenants of Goods, two bring Trover: Defendant pleads *Non Culp.* and they recovered for two Parts. Stra. 820. 4 Bac. Abr. 660. 5 Bac. Abr 200. Cowp. 219. Bull. N. P. 35.

TROVER by the Plaintiffs, Aſſignees of the Commiſſioners of Bankrupts, for divers Goods, was tried in *Middleſex* upon *Non Culp.* before *Rainsford* and *Wylde*, *ægrotante Hale:* It appeared that the Commiſſioners before this Aſſignment to the Plaintiffs had aſſigned the ſame Goods to the Plaintiffs and one *Squibb:* But that this Aſſignment was afterwards cancelled, and a new one made to the Plaintiffs only. And both Judges held, That though the cancelling of the firſt Aſſignment does not alter the Property, but it ſtill remains in them all three, and *Squibb* is no Party to the Action, yet theſe two, *Non Culp.* being pleaded, ſhall recover Damages by this Action for two Parts of the Goods, and ſhall not be nonſuit. But the Defendant might have pleaded this Matter in Abatement to the Writ *quoad tantum*, which having not done, but pleaded *Non Culp.* they, though Joint-Tenants with another, ſhall recover Damages for their Shares: To which Sir *William Jones* for the Plaintiff ſubmitted, *ſed hæſitanter.* But after the Plaintiffs were nonſuit in this Action, becauſe they could not prove the Party a Bankrupt before an Execution executed for theſe Goods at the Suit of another.

Sir

* Sir *Samuel Bernardiſton* againſt Sir *William Some*, late Sheriff of *Suffolk*.

* P. 114

CASE, and declares that a Writ iſſued out of Chancery to the Defendant, then Sheriff of *Suffolk*, to elect a Knight of the County for the Parliament, and that the Plaintiff was choſen by the Majority of Freeholders, and that the Defendant returned the Writ with an Indenture of the ſaid Election, but maliciouſly intending to deprive the Plaintiff, *de fiducia & præd' falſo & deceptive, una cum Indentura præd' retornavit unam alteram Indenturam in Cancellaria præd' ſpecificant' quod aliæ perſonæ liberi tenentes vel major pars liberorum tenentium elegerunt quendem Lionellum Tolmach, ubi revera præd' Lionellus non fuit electus per majorem numerum liberorum tenentium, ratione cujus* the Plaintiff was kept out of the Houſe of Commons, and put to great Charge to prove his Election in the Houſe of Commons. The Defendant pleaded *Non Culp.* and upon Trial at Bar, *Twyſden*, *Rainsford* and *Wylde* held, and ſo directed the Jury, That if this double Return was made maliciouſly, they ought to find for the Plaintiff, which accordingly they did, and gave him 800 *l.* Damages, though the Evidence as to the Malice and Falſity was very ſlender. For the Poll was granted, upon which the Matter ſeeming doubtful, whether ſome of them who voted for the Plaintiff had ſufficient Freehold to qualify them to give their Votes, the Sheriff by Advice of Counſel then preſent, and of ſome Members of Parliament there alſo, made this double Return to prevent an Action for a falſe Return, in Caſe it ſhould appear that ſome Freeholders that voted for the Plaintiff had ſufficient Freehold. And after upon Examination in Parliament, the Election of the Plaintiff was adjudged good, and the Defendant committed by them for making this double Return: And now it was moved in Arreſt of Judgment by *North* Attorney General, and *Scroggs* King's Serjeant, That this Action lies not, and that no ſuch Action was ever * yet maintained in this Caſe; for the Caſe of *Nevil* and *Stroud* was never reſolved, but in reſpect of Difficulty ſent to Parliament, where

Caſe of a Double Return of Members to Parliament. 8. C. 3 Keb. 365, 389. Pollexf. 470. Nelſon's Lutw. 32. Vide 3 Lev. 29, 30. 6 Mod. 45, 49. Ante 50. Poſt. 250. Lutw. 88. 2 Sid. 168. 3 Keb. 26, 32. 1 Danv. 205.

* P. 115

‡ Sid. 168
3 L. 30.
Nelson's Law. 32. 55.

where it never received a Determination: And the Reasons they urged against the Action were, *First*, Because the Falsity or Verity of the Return is only examinable in the House of Commons, who are the sole Judges, and will punish such Faults, and accordingly they have so done in this Case, by committing the Sheriff; and he ought not to be twice punished for the same Fault; and before the Statute of *H.* 6. no Action lay for a false Return, and that only gives an Action of Debt for 100*l.* *Secondly*, The Right of the Party is not considerable in this Case, for this is not an Office of Profit, but of Trust concerning the State. *Thirdly*, What the Sheriff does in this Case, he doth as a Judge; for he is Judge of the Election, and therefore no Action lies against him. *Fourthly*, What the Sheriff doth in this Case is *propter difficultatem* upon his doubtfulness of the Matter, and Judges of Assise may *propter difficultatem* adjourn an Assise; the Sheriff hath done no more in this Case than laid the Matter before the House of Commons, that the Validity of the Votes may be there deliberately examined. To which it was answered by *Maynard*, King's Serjeant, and Sir *William Jones*, Solicitor. *First*, That here was Malice and Falsity in the Sheriff, and thereby Damage and Charge to the Plaintiff, and all this found by the Jury, which is sufficient to maintain an Action in all Cases, whether there has been a like Action in such Case or no before; for Actions upon the Case are founded upon the particular Case, which is mostly new. And the Case of *Nevil* and *Stroud* was not for a double Return, but for making no Return; for there two were elected, and the Sheriff made no Return as to one, and for that he brought the Action. *Secondly*, The Commitment by the Parliament is only to punish the Contempt of the Sheriff as to them and the State, but not to repair the Party for the Damage he sustained, and thus in several Respects one may be twice punished *pro uno delicto*, as it falls out often in many Cases, particularly in criminal Matters, wherein the Party is punished for the King by Indictment, and by the Party for the Special Damage he sustained. *Thirdly*, The Sheriff is not a Judge of the Election in this Case, but a Minister to take the Polls, of which in Point of Sufficiency the House of Commons is Judge. *Fourthly*, Though the Statute of

‡ Sid. 168.
¶ Lev. 30.

H. 6.

H. 6. gives to the Party the 100*l.* * Penalty, that will not prove this Action does not lie at Common Law. The Parliament intended only to give a certain Penalty to the Party, which was considerable then, though not so considerable now, and not leave them to a Jury's Discretion altogether for Damages. *Et adjurnatur ad proximum Terminum*, when *Hale* being in Court, he, *Twysden* and *Wylde*, for as much as the Return is said to be *falso & malitiose & ea intentione* to put the Plaintiff to Charge and Expence, and so found by the Jury, held the Action lay, and gave Judgment for the Plaintiff, *Rainsford* doubting; upon this a Writ of Error was brought in the Exchequer-Chamber, where, by *North* Chief Justice, and five other Judges against two, the Judgment was reversed upon the Matter in Law, that the Action lies not. * P. 116

Vide 3 Lev. 30.

Tomles against *Chandler.*

DEBT upon an Obligation conditioned to perform all Covenants and Conditions in an Indenture of Mortgage, where there was a *Proviso*, That if the Mortgagor pay the Money at the Day, that the Mortgage should be void; and for Breach assigns the Non-payment of the Money at the Day: Hereupon the Defendant demurred; and for the Defendant it was objected, That this was no Forfeiture of the Bond, but of the Estate, and that this Condition is annexed to the Estate for the Benefit of the Mortgagor, in order to have his Estate again upon Payment of the Money, but not to oblige him to pay the Money. Of this Opinion was *Hale*, but *Twysden contra*, and he cited the Case of *Westbrook*, *Hil.* 22 *Car.* 1. *B. R. Rot.* 116. to be so adjudged: upon which it was adjourned; and after at another Day he brought the Record of that Case into Court; whereupon *Hale* changing his Opinion, gave Judgment for the Plaintiff. See 2 *Cro.* 281. and *Yelv.* 206. the like Case and the like Judgment.

Proviso in a Mortgage to redeem, Obligation to perform all Covenants, Conditions, &c. Non-payment is a Breach of the Condition, &c. 1 Bac. Abr. 529.

Astmal

* P. 117

* *Aſtmal* againſt *Aſtmal.*

View denied *quia conſtat Curiæ* the Huſband died ſeiſed. S. C. 3 Keb. 360, 394. Vide 3 Lev. 169.

ERROR of a Judgment in Dower *unde nihil habet* in *Durham*. The Tenants demanded View, whereupon it was entered, *quia ſatis conſtat Curiæ* that the Huſband died ſeiſed, *negatur vitus*. Upon this the Tenants pleaded *ne unque ſeiſie que Dower*, and thereupon Iſſue, and Verdict for the Plaintiff: But the Jury found that the Huſband did not die ſeiſed, and gave no Damages: Judgment hereupon for the Demandant. Upon this Error was brought and aſſigned, that the Court ought not to have denied a View, upon this *conſtat curiæ* that the Huſband died ſeiſed, but the Plaintiff ſhould have counterpleaded the dying ſeiſed.

View in Dower, when and when not.

But upon View of the Books, 25 *E.* 3. 17. a. 2 *Inſt.* 481. the Court held that this being in a Writ of Dower *unde nihil habet*, the View was not by Common Law grantable in this Caſe, and where in the Books View of Dower is counterpleaded, that muſt be intended in a Writ of Right of Dower; and they affirmed the Judgment; yet *Quære* hereof. But *Note*, inaſmuch as in this Caſe the Tenant pleaded, he thereby took upon him Notice of the Lands, which peradventure cures the want of View. 1 *Cro. Wickam* againſt *Enfield.*

Rea againſt *Barnes.*

The Name miſtaken in the Breach and amended. S. C. Poſt. 124.

DEBT upon a Charter-party made to *George Rea* Maſter of a Ship, by *Anne Rea* his Adminiſtratrix, wherein are divers Covenants between him and the Defendant, and in the End thereof each obliges himſelf to the other in 1000*l.* for Performance of Covenants, and declares right till ſhe comes to aſſign the Breach, and then it is *idem Georgius in facto dicit*, for *eadem Anna in facto dicit*, upon this Declaration the

* P. 118

Defendant demurred; * And now his Exception was, That here no Breach is aſſigned by Reaſon of this Miſtake, in ſetting the Name of *George* the Inteſtate, for the Name of *Ann*, the Adminiſtratrix. But all the Declaration being right before, and in the End it being

eadem

eadem Anna profert in Curia Literas Adminiſtrationis, the Court held it meerly the Default of the Clerk, and amendable by the Statute of *H.* 6. *Vide* 2 *Cro.* 587. where ſuch a Fault is held not amendable after Verdict. But after the Plaintiff prayed Leave to diſcontinue for other Faults in the Declaration, which the Court would not grant for want of the Defendant's Conſent, this being an Action of Debt for the Penalty, and he is not without Remedy, for he may have another Action upon the Covenant.

Court denied Leave to diſcontinue in Debt upon an Obligation, for the Plaintiff may have an Action of Covenant. Vid. 1 Saund. 23. 339. 2 Saund. 73, 74. 1 Lev, 48, 227, 298. 1 Sid. 60, 84, 306. 1 Bulſt. 217. All. 20. March 24. Latch 216. Hetl. 2. Cro. Car. 195. Cro. Jac. 315. 1 Mod. 13, 41. Poſt, 124. 2 Danv. 156.

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* Term. Sanct. Hill.

* P. 119

ANNO

26 & 27 Car. II. in Banco Regis.

Corny and *Curtis* againſt *Collingwood.*

ASSUMPSIT by the Plaintiffs *nuper Guardian' Eccleſiæ de Deeping in Com. Lincoln*, and declares That whereas the Mother of the Defendant *Anno* 21 *Regis nunc*, being an Inhabitant at *Deeping*, and taxed towards the Reparation of the Church, was excommunicate for Non-payment; that the Defendant afterwards, 1 *Junii anno* 23 *Regis nunc*, in Conſideration the Biſhop at the Requeſt of the Defendant, would abſoil her, promiſed to pay the Money to the Plaintiffs: And after Verdict for the Plaintiffs it was moved in Arreſt of Judgment

In Conſideration the Biſhop would abſolve the Defendant's Mother at the Requeſt of the Defendant, from an Excommunication, the Defendant promiſed to pay him. S. C. 3 Keb. 359, 434.

Vide 1 Salk. 23, 25. Farſl. 12, 13. Nelſon's Lutw. 148. 2 Saund. 136. Palm. 191. 3 Cro. 155, 170.

Judgment by *Jones* and *Wingfield*, That the Conſideration was inſufficient, for nothing is here done or ſuffered by the Plaintiffs at their Requeſt, but at the Defendant's Requeſt. Alſo it is not ſhewed that they were Churchwardens at the Time of the Promiſe, for *nuper* Churchwardens might be at any other Time. *Sed non allocatur*, for *per Hale & Curiam*, The Mother hath a Benefit by the Abſolution, which it cannot be ſuppoſed the Biſhop would have done, if the Defendants had not promiſed to pay the Money. Alſo it ſhall be intended the Plaintiffs were then Churchwardens and Proſecutors in the Spiritual Court, for otherwiſe they could not be concerned either to take the Promiſe or receive the Money; and it ſhall not be intended that the Biſhop would oblige the Defendants to promiſe Payment to thoſe who had no Right to receive the Money: And after this had been twice moved, the Court gave Judgment for the Plaintiffs.

* P. 120

* *Cragge* againſt *Norfolk*.

Aſſiſe taken by Default, and after tried. B. C. Ante 108 Bull. N. P. 121. Defendant in ſuch Caſe cannot plead or challenge, but may give in Evidence.

ASSISE for the Office of Serjeant of the Mace to the Houſe of Commons. The Plaintiff arraigned the Aſſiſe the firſt Day of the Term: But the Tenant being demanded made Default; *Ideo capiatur Aſſiſa per defaltam.* Then the Demandant counted and ſhewed the King's Patent for the Office, which was read; and the Jury being not yet ſworn, Day was given till *Wedneſday prox.* when *per Curiam*, the Defendant may give what Evidence he can, but he cannot plead either in Abatement or in Bar of the Aſſiſe, nor challenge. On *Wedneſday* the Cauſe was tried at Bar, and the Plaintiff's Evidence of Seiſin was, that one being committed by the Commons to the Cuſtody of *Norfolk*, the Priſoner compounded for the Fees with *Cragge*, and gave him 20*s.* which was held good Seiſin, though *Norfolk* was in Poſſeſſion of the Office long before and after; for *Cragge* could not be diſſeiſed of the Office but at his Election. Alſo *Cragge* being in the Lobby of the Houſe of Commons, near the Door of the Houſe, laid his Hands upon the Mace, then in the Hands of *Norfolk*, in order to take it, but *Norfolk* hindered him, which the Court held was good Evidence, both of his

Seiſin of the Fees is Seiſin of the Office. Laying Hands upon the Mace, and hindered to take it, is a Seiſin and Diſſeiſin of the Office.

Seiſin

Seiſin and Diſſeiſin; and the Recognitors gave their Verdict for the Demandant.

Lord *Eure* againſt *Truron.*

JUDGMENT was given in *B. R.* laſt *Michaelmas* Term for *Truron* againſt the Lord *Eure*; upon which the Lord *Eure* brought Error teſted 26 *Novemb.* returnable in the Houſe of Lords *ad proximam Seſſionem* 13 *Aprilis proximi*: Upon which *Levinz* prayed the Opinion of the Court, Whether *Truron* the Plaintiff might not take Execution, here being a whole Term interpoſing between the *Teſte* and Return, during which Time nothing can be done, ſo that for the apparent Delay this Writ of Error ought not to be a *Superſedeas*; eſpecially in Ejectment, and after Verdict upon *Non Culp.* in which there can be no Probability of Error, and therefore * unleſs the Defendant can ſhew an apparent Error, as was done in *Flowrdew's* Caſe, *Paſch.* 1 *H.* 7. *pl.* 5. & *Paſch.* 21. of this King in this Court, in the Caſe of *Wortley* againſt *North*, and as was held *Mich.* 25. of this King, in *Goſton* and *Sedwick's* Caſe, the Plaintiff ought not to be delayed of his Execution. But *Hale & Curia* would give no Rule for Execution, bidding us to take it at our Peril if by Law we could; for Executions are of Courſe without Rule of Court: But if the other Side had moved for a *Superſedeas*, peradventure they ſaid they ſhould have denied to grant it.

Error in Parliament, returnable a whole Term after the *Teſte* of the Writ.

* P. 121

Ante 93.

Jennings againſt *Hunkin.*

CASE for calling him *Perjured Knave*, and laid the Action in *Devonſhire*. The Defendant juſtified, becauſe the Plaintiff made Oath in *Cornwal*, that he knew not that *J. S.* was Plaintiff in ſuch an Action, *ubi revera* he knew it. Iſſue *de injuria ſua propria abſque tali cauſa*. And Sir *William Jones* now Attorney General, moved that this was a Miſ-trial, and that it ſhould have been tried in *Cornwal*, where the Juſtification ariſes: To which it was anſwered, That this being

Trial where the Action is laid of a Matter ariſing in another County.

8. C. 3 Keb. 350. 371, 509. Vide Raym. 392. 398. 1 Saund. 247. 1 Mod. 37. 199. 2 Mod. 24.

1 Sid. 326. 2 Sterne 258. 1 Vent. 22. 1cc. 2 3. 272. 1 Lev. 207. 208. Post, 164. 3 Keb. 350, 371, 501. 6 Mod. 81. 1 Saund. 247. 2 Saund. 258. 3 Mod. 124. 5 Mod. 223. Buller N. P. 10.

being tried in the County where the Action is laid, it is well enough, by the expreſs Words of Stat. 16 *Car.* 2. *Hale* Chief Juſtice, Though the Words of the Statute are ſo, yet the Intent and Meaning of the Statute is, That it may be tried in the County where the Matter in Iſſue to be tried ariſes; for it is not reaſonable to imagine that the Parliament intended to alter the whole Courſe of Trials, and to have things tried in foreign Counties where the Jury are meer Strangers to the Parties, to the Evidence, and to the Point in Iſſue; it being the great Foundation of Trials by Juries or *per Pais*, that they might not be Strangers. But the Intent of that Statute was only to cure Trials by improper Venues taken in the ſame County where the Matter is to be tried; and the other Juſtices agreed, that this was the reaſonable Intent of the Statute: But then *Hale* ſaid, That knowing or not knowing is Matter tranſitory and triable in any County, although the making Oath before a Judge in * *Cornwal* be local, and then ſo the Iſſue here containing two Matters, *ſcilicet* the making Oath, and the knowing that *J. S.* was Party in ſuch a Cauſe triable in two Counties; a Trial in either of them is good *per* Stat. 21 *Jac.* which hath been ruled to extend to Caſes where the Matter in Iſſue ariſes in two Counties, and the Trial is by one only, as well as where the Matter in Iſſue ariſes in two Places in one County, and the Trial is by one only. To which *Jones* anſwered, That no Place is here alledged where the Oath was made to fix the Iſſue as to that in *Devonſhire*, ſo all may be tried in *Cornwal*, and that the local Matter ought to draw the tranſitory to it, and not the tranſitory Matter, of which no Place is alledged, the local. But if Iſſue had been taken upon the knowing, the Trial had been good; for then the local Matter, *ſcilicet* the making Oath had been waived: *Curia adviſare vult.*

* P. 122

Matter triable in two Counties, and Venu from one only, good *per* 21 *Jac.* 1. Vide 1 Danv. 455, 456.

Hawes againſt *Smith.*

Executor in Conſideration the Plaintiff at his Requeſt accounted with him pro-

ERROR of a Judgment in *Aſſumpſit in Com. Banco* againſt the Defendant an Executor, wherein the Plaintiff declared, That whereas the Teſtator was indebted to him, the Defendant aſſumed in Conſideration the

the Plaintiff at his Requeſt had accounted with him, and was found ſo much in Arrear, to pay it. The Plaintiff had Judgment in *Com. Banco de bonis propriis* of the Executor, and this was aſſigned for Error; but over ruled as no Error, for the Plaintiff was not bound to account with the Executor, and yet he did account at the Requeſt of the Executor. *Et per Hale*, Though a bare Account will not oblige an Executor to pay *de bonis propriis*, yet a Promiſe in conſideration of Forbearance, will; and the Caſe is all one, for it muſt be intended, that an expreſs Requeſt was made to account, and thereupon an expreſs Promiſe to pay; otherwiſe the Evidence would not ſupport the Declaration; whereupon Judgment was affirmed *per totam Curiam.*

miſed to pay; charged *de bonis propriis.* Vide 1 Saund. 112, 306. 2 Saund. 402. 1 Vent. 20, 221. 2 Lev. 189. Jo. 88. Cro. El. 406. Mo. 419. Palm. 314. Hob. 188. 1 Roll. Abr. 929. 2 Cro. 647. Cro. Car. 286.

* *Lomax* againſt *Armorer.* * P. 123

ERROR of a Judgment in Dower in the Court of *Newcaſtle upon Tine*, becauſe it was given upon a Plaint without Writ; for Pleas of Franktenement ought not to be held but upon Writs original. 3 *Cro.* 101. & 1 *Roll.* are Caſes in Point, though a Cuſtom be there alledged for holding Plea of them without Writs original, which is not here pretended. *Hale* at firſt doubted, if a Cuſtom had been alledged; for in *London* they hold Aſſizes of Freſh-force by Cuſtom without Original. To which it was ſaid, Their Cuſtoms are confirmed *per* Stat. *R.* 2. But he ſaid, That in other Places alſo they try Aſſiſes of Freſh-force by Cuſtom. But after Argument of both Sides, the Judgment was reverſed. *Levinz* for the Plaintiff in Error.

Pleas of Franktenement cannot be without Writ.

Kirkebridge againſt *Wilſon.*

DEBT upon an Obligation to the Sheriff, which was: *Noverint univerſi, &c. Nos W. Wilſon & Tho. Richards de Comitatu Cumbriæ teneri Johanni Kirkebride Vicecomiti*, (without ſaying *Cumbriæ* or *Com' predict'*) *ad reſpondend* the Plaintiff generally, but does not ſay in what Action.) The Defendant pleads the

Bond of Bail *de Com' Cumbr'* to the Sheriff, without ſaying *de Com' præd'.*

Statute, whereupon the Plaintiff demurred: And *Firſt*, It was held *per Hale & Curiam*, That the Obligation was good, for though the Statute directs the Obligation to be taken by the Name of his Office, yet the Bail being named *de Com. Cumbriæ* he ſhall be intended Sheriff of the County, and this will ſupply the Omiſſion of *Vicecom. Com. Cumbriæ*, or *Com. præd. Secondly*, Though the *Latitat* be *in placito Tranſgreſſionis*, upon which the Arreſt was, and the Condition is to appear generally; whereupon it was objected, That he is bound to anſwer all Actions, whether Debt, Covenant, *&c.* yet the Court held the Obligation good: For *Firſt*, No other Action ſhall be intended. *Secondly*, The * Words of the Statute require no more than an Appearance, and no Words *ad reſpondendum, &c.* ſo that they are but Surpluſage; and it was once a Doubt, Whether the Sheriff could bind the Party *ad reſpondendum omnino.* But afterwards by Conſent, the Parties waived the Demurrer, and went to Trial in the original Action, the Defendant ſaving the Sheriff againſt Amerciaments. *Levinz* of Counſel for the Defendant.

Condition to appear generally, without ſaying to anſwer, or to whom. Vide poſt, 177, 180. 2 Show. pl. 38.

* P. 124

Stra. 1155. 4 Bac. Abr. 462. Doug. 665. Cowp. 178. 1 Term. Rep. 240.

Rea againſt *Burnis.*

Covenant to pay *tantum per* Ton, Breach in not paying for ſo many Tons and a Hogſhead. S. C. Ante 117, 118. Q. Ante 13, 26, 92. & 3 Lev. 189. Diſcontinuance after Argument in Debt for a Penalty. Ante 118. *&c.* ib.

DEBT upon a Penalty in a Charter-Party, whereby the Defendant covenanted to pay the Plaintiff 3 *l. per* Tun for Goods imported, and for Performance, *&c.* each Party obliged himſelf to the other in a Penalty, and this Action was brought for the ſaid Penalty, and Breach aſſigned in not paying for ſo many Tons and one Hogſhead, which came to ſo much. And upon Demurrer the Declaration and Breach was ruled ill for aſſigning Non-payment for the Hogſhead; for the Covenant is only to pay ſo much per Ton; *Aliter*, were it to pay *ſecundam ratam* of ſo much *per* Ton. But now the Court ſuffered the Plaintiff to diſcontinue upon Payment of Coſts, though the Action is for a Penalty, and the Caſe had been argued.

1 Mod. 13, 48, 227, 298. 1 Saund. 23, 339. 2 Saund. 73, *&c.*

Gavel

Gavel againſt *Scudamore.*

TRESPASS in the Palace-Court *ad dampnum* 4*l.* 19*s.* The Defendant removed the Cauſe *in B. R.* where it was tried, and 15*s.* Damages given by the Jury: And the Queſtion was upon the new Statute, Whether he ſhould have more Coſts than Damages? For it was urged for the Plaintiff, That this is not an original Caſe in the Court, but brought hither by *Habeas Corpus*, which is not within the Statute, as it has been ruled in *Com. Banc. Curia.* This ſeems reaſonable, being removed by the Defendant; otherwiſe, where the Removal is by the Plaintiff; for ſo every Plaintiff may commence trivial Actions in inferior Courts, and after remove them hither, and defeat the Statute, and become more vexatious now than they were before the Statute: They would adviſe with the Judges of the Common Pleas, that the ſame Rule as to this Matter might be ſettled in both Courts.

Cauſes in inferior Courts if removed *per* Defendant, allowed more Coſts than Damages, *aliter* if by the Plaintiff. Poſt, 234. Vide 5 Mod. 74.

* P. 125

5 Mod. 74.

Monday againſt *Porton.*

PROHIBITION, and declares *Quod placita de Advocationibus ſpectant ad Communem Legem, & non ad Curiam Eccleſiaſticam*; and that he was inſtituted to the Church of *D.* and the Defendant ſued him in the Spiritual Court, libelling that he was inſtituted to the ſaid Church and inducted before *Monday*, and that *Monday* obtained a Superinſtitution upon him, which being a Scandal to his Title, he ſued there to ſet aſide the Superinſtitution; whereupon that Court proceeded, though this Plea, there being Induction, the Caſe belonged to the Common Law. The Defendant pleaded *Non proſecutus eſt contra prohibitionem.* But *pro conſultatione habenda* demurred. *Et per Curiam*, He ought to have a Conſultation, for though *Porton* was inducted, it does not appear *Monday* was inducted, and ſo the Plea ſtands only upon the Superinſtitution, which is Matter proper for the Spiritual Court. But afterwards it being ſhewed to the Court that *Monday* was inducted alſo,

Induction not triable in the Eccleſiaſtical Court.

Vide poſt, 128.

alſo, the Court ſtayed the Conſultation; ſo that the Plaintiff might declare *de novo* upon his Inſtitution and Induction. But upon this Declaration the Prohibition cannot ſtand.

Wilſon againſt *Done.*

Pleads that he made it appear, but does not ſhew how. S. C. 3 Keb. 183. 393. 424.

* P. 126

ASSUMPSIT, That whereas the Defendant was bound in an Obligation for payment of Money, Part of which was unpaid; the Defendant promiſed, That if he made it not appear before *J. S.* that that Part was paid, that he would pay it: The Defendant pleaded, that he made it appear before *J. S.* that that Part was paid, upon which the * Plaintiff demurred, and had Judgment in the Common Pleas, becauſe he does not ſhew how he made it appear: And now in Error upon this Judgment here, the Judgment was affirmed for the ſame Reaſon.

Burdet againſt *Thrule.*

Account as Receiver, and ſays not by whoſe Hands. Account againſt one as Receiver, when it ſhould be Bailiff. is bad upon Demurrer, but cured *per* Judgment *quod computet per* default.

ACCOUNT by the Plaintiff a Merchant, againſt the Defendant a Merchant, being his Factor, *de placito quod reddat ei rationabilem compotum de tempore quo fuit Receptor Bonorum & Merchandizorum ad compotum inde ei reddend'*, and ſo declares of divers Goods in particular, (but does not ſhew by whoſe Hands) the Plaintiff had Judgment *quod computet* by Default: Upon which the Defendant pleaded an inſufficient Plea before the Auditors, whereupon a Demurrer, and Judgment for the Plaintiff, and a Writ of Enquiry of Damages. And now it was moved in Arreſt of Judgment, That the Declaration is ill. *Firſt*, Becauſe it charges the Defendant as Receiver, and does not ſhew by whoſe Hands. *Secondly*, The Defendant ought not to be charged as Receiver in this Caſe, but as Bailiff, for he was to merchandize with the Goods, and by Conſequence to have his Expences, Allowances and Factorage; and Judgment in Account as Receiver is no Bar in an Action

Action of Account as Bailiff, *Co. Litt.* 172. *a.* 1 *Roll.* 119. *nu.* 9. *ibid.* 118. *Let. B. nu.* 2. 4 *H.* 6. 27. *a.* 43 *E.* 3. 4. *b.* 46 *E.* 3. But *per Curiam*, Judgment was given for the Plaintiff, for *per Hale*, Though he ſhould have been charged as Bailiff, yet the Defendant ſhould have demurred to the Declaration to take Advantage of that, and this is now paſt by the Judgment *quod computet*. *Levinz* for the Defendant.

How againſt *Stile.*

EJECTMENT, and upon *Non culp.* and a Special Verdict found at Bar, the Caſe was: *Coke* being ſeiſed, made a Leaſe to *Fountain* for ninety-nine Years and two Years after by Leaſe and Releaſe, he conveyed the Inheritance to the ſaid *Fountain*, and another to the Uſe of *Coke* and the Heirs of his Body, with divers Remainders over: And whether by this Conveyance the Leaſe for ninety nine Years was merged * in All or in Part? was the Queſtion. And *Pemberton* argued for the Plaintiff, That if there be any Merger in this Caſe, it is only for a Moiety; and he ſaid, the Reaſon of Merger by accepting of another Eſtate, is not the Admittance of the Leſſor's Power to demiſe, as appears in this, that a new Demiſe by the Leſſor to the ſame Leſſee, works no Merger nor Surrender of the firſt Term, where there is an interpoſing Term; but the true Reaſon is, the coming of two Eſtates together, which cannot ſtand together, and then the Merger in this Caſe extends only to a Moiety, the other Moiety of the new Leaſe being to a Stranger. *Secondly*, He argued, Here was no Merger at all, and that by the expreſs Words of Stat. 27 *H.* 8. of Uſes, which ſaves the Right of him who is ſeiſed, to the Uſe of another Perſon. *Weſton contra*, The true Reaſon of Merger in theſe Caſes is the Admittance that the Leſſor hath Power to demiſe. 5 *Co. Ives's* Caſe. And ſo in this Caſe the whole Term is merged, for he has admitted a Power in the Leſſor to demiſe the whole, though a Moiety only to himſelf. And *Secondly*, The Statute ſaves the Right of them who are ſeiſed, to the Uſe of others. But here the Leaſe is merged by accepting a Leaſe

Leſſor by Leaſe and Releaſe, conveys his Reverſion to the Leſſee and *J. S.* to the Uſe of himſelf.

* P. 127

S. C. 3 Keb. 283, 309, 430, 452. 1 Stra. 34, 101. 2 Stra. 1092. 1253. Cruiſe on Rec. 48. 1 Burr. 79. 3 Bac. Abr. 452. Cowp. 704. 1 Term. Rep. 741.

Vide poſtea Wigſon and *Garret's* Caſe, Mich. 29.

Leaſe for a Year, before he became ſeiſed by the Releaſe to any other Uſe, and ſo not within the Statute. *Adjournatur.*

Biddulph againſt *Harriſon.*

One Conuſor in a Fine dies before King's Silver paid S. C. 3 Keb. 393, 426, 438, 441.

ERROR of a Fine levied by four Conuſors, and aſſigns the Death of two, before the Fine ingroſſed, or King's Silver paid. And whether the Fine ſhould be reverſed *in toto*, or only *quoad* them two? was the Queſtion: And *Newdigate* Serjeant, argued it ſhould be reverſed *in toto*, becauſe the Writ abated, and ſo it is a Fine without Original, and cited *Hill.* 1662. *B. R. Rot.* 1179. *Roe* againſt *Yeatly*, to be ſo adjudged.

* P. 128

* *Trafford* againſt *Trafford.*

Suit *pro rationabili parte* may be in the Eccleſiaſtical Court. Q. 1 Vent. 259, 275. Raym. 470. Ante 100. 125.

TRAFFORD ſued his Brother Executor of his Father, for his reaſonable Part of the Goods of the Father in the Spiritual Court, according to the Cuſtom of the Province of *York*; whereupon *Levinz* moved for a Prohibition, for this is a temporal Cauſe, founded upon the Cuſtom, for which there is an original Form in the Regiſter, and where there is a Remedy at Common Law, the Spiritual Court is not to meddle, *F. N. B.* 53. *H.* But *per Twyſden*, *Rainsford* and *Wylde*, abſent *Hale*, the Prohibition was denied, for in this Caſe they ſaid, and in the Caſe of a Penſion, both Courts have Juriſdiction.

The *King* againſt the Lord *Lee.*

For ill uſage of the Wife the Huſband bound to his Good Behaviour.

HABEAS *Corpus* was granted to him the laſt Term, to bring the Body of his Wife into Court, upon Affidavits of ill Uſage, Impriſonment and Danger of her Life, as was done before in the Caſe of Sir *Philip Howard*; the Lord *Lee* brought his Wife into Court, where the one charged the other with Unkindneſſes, and ſhe made Oath in Court, That ſhe went in Danger of

of her Life by him; and notwithſtanding divers Affidavits were made in Court to the contrary, of his good Uſage, the Court offered to bind him with Sureties, according to *F. N. B.* 80. & 239. *B.* But they declared they could do no more than bind him, and that they could not remove her from him.

The *King* againſt Sir *Robert Viner* Lord Mayor of *London.*

HABEAS Corpus was directed to him to bring in the Body of *Bridget Hide*, Daughter and Heir of a great Eſtate to Sir *Thomas Hide*, which Daughter he had by one that was afterwards the Wife of Sir *Robert Viner*, and who is now dead, the Daughter being of the Age of thirteen, and left in the Cuſtody of Sir *Robert* at the Death of her Mother: And now it was alledged, that Sir * *Robert* had no Right to detain her, her Aunt being Guardian; and that his Deſign was to marry her to a great Man, though ſhe was already (as it was ſaid) married by her Mother to one *Emerton*, her Kinſman. And now upon the *Pluries Hab. Corpus* he returned, *nullam habeo talem perſonam in cuſtodia mea, nec habui die Impetrationis hujus Brevis vel unquam poſtea.* Which Return was adjudged ill; for it may be he had ſuch a Perſon *die impetrationis* of the firſt Writ: Whereupon he afterwards brought in the young Lady by Conſent, to prevent an Attachment, which the Court intended to grant, and the Damſel being in Court, and aſked the Queſtion, choſe to ſtay with Sir *Robert Viner*, and not to go to her Aunt her Guardian in Law, nor to *Emerton* her pretended Huſband: Hereupon the Court would not remove her, but left her in the Hands of Sir *Robert Viner*, upon his Recognizance of 40000*l.* not to ſuffer her to marry while ſhe ſtaid in his Cuſtody; being ordered alſo, to let her Aunt and the reſt of her Friends viſit her, while ſhe ſtaid with him.

Pluries Hab. Corp. returned *Nullam talem habeo in cuſtodia mea, nec habui die impetrationis hujus brevis,* ill.

* P. 129

Feme brought into Court *per Habeas Corpus*, choſe to return, the Court would not remove her.

Vide ante 128.

Deakins

Deakins againſt Sir *William Scroggs*, King's Serjeant, and *Gilby*, in *B. R.*

Serjeant and common Perſon ſued jointly, no Privilege. Vide 2 Mod. 294. P. 30. Car. 2. in Cam. Scacc. Hambleton v. Scroggs & *al'*, Cur. adviſare vult. Serjeants are ſuable in any Courts at *Weſtminſter*, but not elſewhere. Vide 14 H. 4. 21. 10 E. 4. 15. Vide 2 Lilly 212.

IN Battery againſt them; *Gilby* pleaded *ſon Aſſault Demeſne*, *Scroggs* pleaded his Privilege of Serjeant to be ſuable only *in C. B.* upon which the Plaintiff demurred, becauſe he is not a ſole Defendant in this Caſe, but ſued jointly with another. It was argued on his Behalf, That Serjeants and their Servants have Privilege of being only ſuable *in Com Banco*, 1 *Cro.* Serjeant *Hoſkins*'s Man's Caſe. And further, as to the being joined in one Action, That where the Action is joint and cannot be ſevered, there if the Defendants be ſued jointly, the Privilege of one is loſt for want of Privilege in another: But where the Action is ſeverable as in this Caſe, the want of Privilege in one Defendant, ought not to toll the Privilege of the other. *Curia*, A Serjeant has no Privilege againſt any Court of *Weſtminſter*, and in Fact they do practiſe in all Courts of *Weſtminſter*, and are not confined to the Common Pleas. But if a Serjeant be ſued in any other Court than at *Weſtminſter*, he may plead his Privilege; whereupon a *Reſpondeas ouſter* was awarded.

* P. 130

* *City* againſt *City*.

Huſband makes a voluntary Aſſignment of a Term, it ſhall not bar the Wife's Title to her cuſtomary Part. 2 Jo. 204. Vide 1 Lev. 227, 162. 2 Chan. Caſes 117, 129. 2 Chan. Rep. 179.

THE Father a Freeman of *London*, being poſſeſſed of a Term, by Deed aſſigned it to his Son, as a Proviſion, and died; the Mother ſued in Chancery for her cuſtomary Part: And now upon Iſſue at a Trial before *Hale*, after the Term, Whether the Wife ſhall be bound by this Aſſignment of the Father, ſo as to be barred of her cuſtomary Part? It was proved and found by the Jury, that ſhe is not barred thereby, it being voluntary, but has ſtill a Title to her cuſtomary Part of the Term: The ſame Law of Goods.

1 Chan. Rep. 26, 27. 84. Ante 32.

Termino

Termino Paſchæ,

ANNO

27 Car. II. in Banco Regis.

Otto againſt *Selwin.*

TRESPASS and Falſe Impriſonment, the Defendant juſtified by Warrant out of the Court of Admiralty, which recites that a Caſe was depending therein *de re maritima*, and commanded the Defendant, their Officer, to take the Plaintiff; whereupon he took him. Upon this the Plaintiff demurred: And for the Plaintiff it was argued, That this Plea is naught, for not averring that the Cauſe was maritime, ſo as it may be tried whether it be ſo or no; for if the Cauſe was not within their Conuſance, their Warrant will not juſtify their Officer; and cited 10 *Co. Caſe del Marſhalſea. Sed per Hale & Curiam*, It would be very hard to put the Officer in all Cauſes, to ſhew the Matter was within the Juriſdiction of the Court, to which they miniſter, it is ſufficient for him to plead the Warrant, which he is bound to obey; and in this Caſe it does not appear but that the Matter of the Cauſe was within their Juriſdiction. But in the Caſe of the *Marſhalſea* it appeared the Cauſe was not within their Juriſdiction; whereupon they ruled Judgment for the Defendant. *Tamen vide Rolle's* 2 *Rep.* 109. *Martin* againſt the *Marſhal*, in Caſe of an inferior Court, (as in a Juſtification by the Officer of the Court of Equity at *York*) it muſt be averred that the Cauſe of Action aroſe *infra Juriſdictionem Curiæ.*

Officer of the Admiralty juſtifies by Warrant, without ſhewing the Cauſe was within their Juriſdiction. S. C. 3 Keb. 449. Vide 3 Lew. 244. 1 Lutw. 937, &c. Nelſon's Lutw. 290, to 297. 1 Roll. Abr. 759. Mo. 847. 1 Mod. 63, 81. 1 Sid. 464. 2 Show. Oliett & Beſſey.

Jame

* P. 132

* *James* againſt *Peirce.*

Priſoner eſcapes and comes back, and is in Priſon, and a new Warden is made, and then eſcapes; the Plaintiff may ſue the new or old Warden for Eſcape. S. C. 1 Vent. 4. 269. 3 Keb. 453, 463.

DEBT againſt the Warden of the *Fleet* for an Eſcape, and upon *Nil debet* a Special Verdict was found before *Hale* Chief Juſtice at *Guild-Hall*, and the Caſe was thus: *Peirce* the former Warden ſuffered a voluntary Eſcape by one in Execution; the Priſoner came back and continued in Priſon till a new Warden was made; he was turned over to the new Warden, the now Defendant, who had him in Priſon, and afterwards ſuffered him to eſcape. And whether the Priſoner was ſo abſolutely diſcharged by the firſt Eſcape, that he could not be in Priſon again? was the Queſtion: And upon the firſt Argument, and the Authority of 1 *Rolle* 902. the Court was of Opinion, That notwithſtanding the firſt voluntary Eſcape, when the Priſoner was in Priſon again, he was ſo far in Execution, that the Plaintiff hath Election either to take him as now in Execution, and ſo charge the new Warden for the laſt Eſcape, or to admit him out of Execution, and charge the old Warden; but he ſhall not be obliged to do ſo, for the old Warden may be dead, or perhaps not reſponſible. Yet before they would give Judgment, they ſaid, They would confer with the reſt of the Judges, ſo that this Point might be ſettled by all the Judges, wherefore they adjourned it for a Week. But in the Interim the Plaintiff got an Injunction out of Chancery, and ſo no Judgment was given in this Caſe.

Ante 109.

But *Note*, After this the Judgment was given in the Caſe of *Lenthal* againſt *Lenthal*, which ſee reported before, *pag.* 109.

* P. 133

* *Aſtry* againſt *Nevit* in the Exchequer.

Executor *de Tort*, waſtes and dies, Whether his Goods are liable to anſwer.

DEBT againſt the Defendant Executor of *A.* Executor of *B.* The Defendant pleaded, That *A.* was never Executor of *B.* nor ever adminiſtered as his Executor; and Iſſue thereupon, and a Special Verdict, which found that *A.* was *Executor de ſon tort* to *B.* & *ſi, &c.*

ſi, &c. And the ſole Queſtion was, Whether *A.* being a *tort Executor*, his Executor ſhall be charged for the Goods that the *tort Executor* waſted, he leaving Aſſets in the Hands of the Defendant? It was argued by *Duncomb* for the Plaintiff, and *Thompſon* and *Hoyl* for the Defendant. And *Turner* Chief Baron, held ſtrongly that he ſhall be charged, for *B.* having the Goods, the *Tort* in waſting does not die with him, but charges his Executor; contrary to the Opinion of *Brown* and *Collins*'s Caſe, *Antea in B. R. Et vide nunc Stat.* 30 *Car.* 2. *Quære*, If in this Caſe upon the Plea *ne unques* Executor in another, the Defendant ſhall be charged *de bonis propriis*, as he ſhall when he pleads *ne unques* Executor himſelf?

S. C. 3 Keb. 533. Lex Teſtam. 523. Vide ante 40, 110. Poſt. 133, 145, 189. 1 Vent. 355, & ibid. 315, 321. 2 Show. 55, 56. Vide 1 Lev. 147, &c. ib. 3 Lev. 35. Ante 110. 1 Term. Rep. 691.

Aſhton againſt *Jennings.*

BATTERY by the Plaintiff a Doctor of Divinity, and his Wife, againſt the Defendant and his Wife, for a Battery done by the Wife of the Defendant, to the Wife of the Plaintiff: The Defendant pleaded that her Huſband is a Juſtice of Peace and an Eſquire in the Town of *Plymouth*, where the Battery was done, and that the Wife of the Defendant ought to have Precedence of the Wife of the Plaintiff, and that at ſuch a Funeral in *Plymouth*, the Plaintiff's Wife took Precedence of the Defendant's Wife, wherefore ſhe *molliter manus impoſuit* upon the Plaintiff's Wife to remove her; upon this the Plaintiff demurred. And now *Saunders* argued, That the Wife of an Eſquire, and a Juſtice of Peace, ought to have Precedence, and take Place before the Wife of a Doctor of Divinity, for though a Doctor of Divinity takes Place of an Eſquire (and as *Wylde* ſaid, contends with Serjeants at Law for Precedence) yet *Saunders* ſaid, That was in reſpect of his Degree in the Univerſity, which is perſonal to himſelf only, and not communicable to his Wife; no more than the Dignities of a Biſhop to the Wife of a Biſhop, who is no Lady, nor takes Place as ſuch, though the Biſhop himſelf be a Baron of Parliament, and takes Place as ſuch. *Rainsford* and *Wylde* being only in Court, ſaid, They would not countenance ſuch a Juſtification,

Matter of Precedence, where determinable. S. C. 3 Keb. 462. 2 Raym. 251.

* P. 134.

Doctor's Wife not to take Place before the Wife of an Eſquire. but the Doctor himſelf does. Vide 1 Lev. 230, &c. ib. 2 Hawk. P. C. 15.

Juſtification, and that they were not Judges of Precedence, but the Court of Honour. And without determining the Right of Precedence, or any Regard had to it, gave Judgment for the Plaintiff, for that the Defendant by his Plea had confeſſed the Battery.

Howard againſt *Wickliffe.*

Plea, no clear Profits. Repl. there were Profits to 20*l.* Rejoinder, no clear Profits: Iſſue thereupon, and Verdict that there were clear Profits as the Plaintiff replied, naught. S. C. 3 Keb. 466, 466. Vide 1 Lev. 32. 2 Saund. 318, 319. 6 Mod. 2, 3, 11. 1 Salk. 216. 2 Salk. 570. 1 Burr. 292. 297. Comyns Rep. 10. /

DEBT upon an Obligation, conditioned to pay all the clear Profits of a Coal-Mine: The Defendant pleaded Performance according to the Condition. The Plaintiff replied and ſaid, That the Profits amounted to 20*l.* and for Breach aſſigns the Non-payment of it. Defendant rejoins, There was no clear Profits, & *de hoc ponit ſe*, &c. and the Plaintiff *ſimiliter*. The Jury found there were clear Profits, *modo & forma*, as the Plaintiff replied, and thereupon Judgment for the Plaintiff in *Durham*, and Error brought thereon, and the Judgment reverſed, becauſe the Replication does not ſhew there were any clear Profits, but Profits to 20*l.* which might be, and yet wholly ſwallowed up in the Charges of obtaining it: And though the Verdict finds there were clear Profits, yet it is not found abſolutely ſo, but with as the Plaintiff had replied, whereas he did not ſo reply. And this is not cured by the laſt or any other Statute of *Jeofails*.

Ridley

* *Ridley* againſt *Pownell.* * P. 136

CASE for diſturbing him in his Office of Regiſter to the Biſhop of *Briſtol:* Upon *Non culp.* a Special Verdict was found, that *Briſtol* is a new Biſhoprick, founded in the Time of *H.* 8. and taken out of the Biſhoprick of *Saliſbury*; and that this Office is a neceſſary Office, and hath been granted *ſeparalibus temporibus*, ſince the Foundation of the Biſhoprick to the Grantee and his Aſſigns for three Lives: And that *Robert* the Biſhop, 1 *Octob.* 1639. granted the ſame to *Iſrael Pownell*, and found the Grant, which recites, that *John*, Biſhop, *&c.* had granted it to *Heape* and his Aſſigns, and the Aſſignees of them for a Term in the Grant mentioned; and that *Robert*, Biſhop, *&c.* granted it to *Iſrael Pownell*, and his Aſſigns, *& idoneis aſſignatis ſuis*, which Grants by the Opinion of ſome learned in the Law, were good. That the preſent Biſhop in Conſideration of the Surrender of theſe Grants, granted it to *Iſrael Pownell*, and his Aſſigns, and the Aſſignees of them, for the Lives of *Nathaniel*, *Edward*, and *Iſrael Pownell*; and that Livery and Seiſin was made in the Houſe belonging to the Office by Attorney, which Grant was confirmed by the Dean and Chapter. And that *Edward* is ſtill living, the Biſhop dead, and the preſent Biſhop his Succeſſor, granted the ſame to the Plaintiff for Life, and made Livery as before, and the Dean and Chapter confirmed it. They alſo found Stat. 1 *Eliz.* That all Grants by Biſhops, of Manors, Lands, Tenements and Hereditaments, to their Biſhopricks appertaining, other than for twenty-one Years, or three Lives, whereupon the ancient Rent ſhould be reſerved, are void. And if for the Plaintiff, they found for the Plaintiff, and if not, for the Defendant. The Caſe was argued by *Weſton* for the Plaintiff, and by *Pawlett* for the Defendant. And *Weſton* argued, That a Leaſe for three Lives cannot be good to bind the Succeſſor, and cited 1 *Cro. Young* againſt *Stowell*, *& ibidem Young* againſt *Fowler*, *& ibidem Lambe* againſt *Walker*, and *Bolton*'s Caſe, cited 10 *Co.* in the Biſhop of *Saliſbury*'s Caſe. In which Caſes it is ſaid, the Words *uſually grant*, muſt be intended, granted Time out of Mind; which cannot be in this Caſe, the See itſelf

Biſhops may grant Offices for one, two, or three Lives, if ſo they die before the 1 *Eliz.* otherwiſe not. S. C. 3 Keb. 472, 506, 540, 560.

Cro. Car. 203. 400. Mar. 38. 1 Jo. 307. Cro. Car. 187.

* P. 137 * itſelf being founded within Time of Memory: And though this Biſhoprick was taken out of the Biſhoprick of *Sarum*, the Preſcription in the Biſhoprick of *Sarum*, will not extend to this Part derived out of the former, but remains in the old Biſhoprick of *Sarum*. Farther he urged, That the Verdict has not found any Title or prior Poſſeſſion in the Defendant, for though he be one of the *ceſtui que vies*, that gives him no Title, admitting the Grant were good, no Aſſignment being found to be made to him; and there can be no Occupancy of an Office. Then the Plaintiff being here put into Poſſeſſion by Livery and Seiſin made to him, though there ſhould be Title in the Aſſignees of *Iſrael*, yet the Plaintiff in this Caſe, (the Defendant having no Title nor primer Poſſeſſion) muſt recover as againſt a Treſpaſſor. *Paulett* anſwered to the laſt Matter firſt, and he ſaid, The Plaintiff declaring of a Diſturbance to him in his Office, if the Office be not his own, the Defendant could not be guilty of a Diſturbance to him in his Office, but ſhall be reſponſible to him that hath the Right, if he himſelf has no Title: And to the Matter he argued, there was no Difference between new and ancient Biſhopricks as to granting of Offices, for they do not make Grants by Virtue of any Preſcription, but as Owners, and by the Power they have as being ſeiſed of the Eſtates; and therefore before the Statute, the Biſhops as well of ancient as new Biſhopricks, might alien their Eſtates as any other Perſon might: And if their Grants of Offices had been by Preſcription, the Preſcription ſhould always have been pleaded, which is not done in the Biſhop of *Saliſbury*'s Caſe, nor in any other: Offices of Neceſſity are not reſtrained from being granted by any Statute, and this is an Office of Neceſſity, neither is it any Prejudice to the Succeſſor to have an Officer ready in the Office, of whom he is ſure of by the Office's being granted for three Lives, and alſo ſurer of an able Officer; in *Young* and *Fowler*'s Caſe, the Grant of the Regiſter's Place in Reverſion was held good for this Reaſon. And *March*'s *Rep.* 38. If an Office was ſo granted before 1 *Eliz.* it is a Badge of the neceſſity of ſuch Grants. And in *Lamb*'s Caſe, the Reaſon why that Grant was held void was, Becauſe it had not been ſo granted before the Year 1609, which was long after the firſt of *Eliz.*

10 Co. 59, 60.

Ante 136.

Eliz. But here it is found to be granted *ſeparalibus temporibus* after the Foundation of the Biſhoprick in *Henry* the Eighth's Time. *Hale* Chief Juſtice, * Before 1 *Eliz.* there was no Difference betwen the Grant of Offices of ancient and new Biſhopricks; both made their Grants as Owners, and not by Preſcription; and whether new or ancient, if they uſually granted for three Lives before this Statute, they may grant ſo after. But this Verdict is defective in this, that it does not find it was uſually ſo done before 1 *Eliz.* but that it was ſo done *ſeparalibus temporibus* ſince the Foundation in the Time of *H.* 8. which may be, and yet not till after 1 *Eliz.* to ſupply which Defect he adviſed the Parties to take a *Venire Facias de novo.* And he held, That this being taken out of the Biſhoprick of *Saliſbury*, there are the ſame Preſcriptions and Appendances to this Part which belong to the Biſhoprick of *Sarum*. *Cæteri Juſticiarii* inclined to the Opinion of *Hale*, and that there was no difference between ancient and new Biſhopricks as to Grants of Offices, but that both do it as Owners, and that neither ancient nor new Biſhopricks can grant otherwiſe than they did before the firſt of *Eliz.* But that they are all equally reſtrained by this Statute; and that if it were not for the Incertainty of the Verdict in this Point, they would give Judgment for the Defendant: But the Defendant not agreeing to the Propoſal of a new *Venire Facias*, *Adjournatur*: *Sed poſtea* in *Michaelmas* Term following the Parties agreed to take a *Venire facias de novo.*

Cro. Car. 187.

* P. 138

The Grant of Offices by Biſhops, is as Owners, not by Preſcription.

A new Biſhoprick derived out of an ancient Biſhoprick, has the ſame Preſcriptions, Appendances, &c.

Baxter againſt *Doudſwell.*

EJECTMENT, and upon *Non Culp.* and Special Verdict the Caſe was: One ſeiſed of Land in Borough *Engliſh*, demiſed it to *A* and his Heirs for the Life of *B.* *A.* died, leaving two Sons, *A.* the eldeſt and *D.* the youngeſt. And whether the Land ſhall go to *A.* as Heir by the Common Law, or to *D.* as Heir by the Cuſtom? was the Queſtion. Argued by Serjeant *Maynard* and *Saunders*, That it ſhould go to the eldeſt Son, for this is not a Diſcent to him as Heir, but a Special Limitation to prevent Occupancy, and he takes it as a Special Occupant and a Purchaſor in this Caſe, and

Borough-*Engliſh* granted to a Man and his Heirs for three Lives, it ſhall go to his cuſtomary Heir, and not to the Heir at Common Law. S. C. 3 Keb. 475, 486, 498. 2 Danv. 542. pl. 4. Vide 1 Roll.

* P 139 Abr. 623. pl. 1, 2, 3. 501. M. 2. & 624 B. Style 145, 146. 1 Mod. 102. 2 Sid. 61. 1 Salk. 243. 6 Mod. 120. Ante 87. 1 Lev. 172. 239, &c. ib.

and therefore muſt be Heir at Common Law. But it was argued * by *Heneage Finch* Junior, That he takes in this Caſe as Heir, and ſo is 10 *Co. Rep. Seyman's* Caſe, ſuch an Eſtate as this is taken as a diſcendable Freehold. And then it ought to diſcend to him who is Heir by the Cuſtom, which runs with the Land, and guides the Diſcent to the youngeſt Son. And of this Opinion was the Court, and gave Judgment accordingly.

Vide 1 Sid. 198. 2 Sid. 61. 1 Jo. 360. 1 Lev. 172, 293, &c. ib.

Webb againſt *Batchelor.*

Church-Lands ſubject to new Charges by Act of Parliament. S. C. 3 Keb. 476, 507. 1 Vent. 273. Vide 1 Lutw. 936, 937. Keiſon 8 Lutw. 291.

TRESPASS by the Plaintiff a Parſon, for taking his Beaſts: The Defendant juſtified by Warrant from a Juſtice of Peace to take them for a Tax for the Repair of the Highways. The Plaintiff demurred, pretending the Church-Lands are not ſubject to ſuch Charges: But *per Hale & Curiam*, they are ſubject to new Charges by Act of Parliament, as well as other Lands, if they be not excepted; and gave Judgment for the Defendant.

The *King* againſt the Lord *Fitz-Water.*

Jeofails in Informations, whether cured by Verdict. S. C. 3 Keb. 459, 465, 485, 519, 555.

INFORMATION in Nature of a *Quo Warranto*, for fiſhing in the River *Thames*, in a Place extending to *B.* and ſeven Pariſhes, as appear by the Record. After Verdict for the Defendant it was moved by *Maynard* in Arreſt of Judgment, That the *Venire* is from one Pariſh only, where it ought to be from all, and that this is not cured by the Statute of *Jeofails*, being in an Information, which is excepted out of the Statute, 1 *Cro. Rex* v. *Talbott*, and alſo the new Statute of 16 and 17 *Car.* 2. contains an Exception for all Appeals, Indictments and Informations upon Penal Statutes. It was anſwered, That this is the Fault of the Proſecutor himſelf who ſued out the *Venire Facias*, and therefore he ought not to take Advantage of his own Default. And the *Proviſo* except Informations, *&c.* upon Penal Laws

Laws only, which this Caſe is not. And to the Opinion in *Talbot*'s Caſe they ſaid, it ſeemed unreaſonable to hold, that the King was not bound by the Law *quia* not named in the Law, for it appears by the Exception, That the * Parliament took it the King had been bound, though not expreſly named, for otherwiſe there was no occaſion for the Exception; and if in theſe Caſes the King had been bound but for the Exception, he ſhall be bound in this Caſe which is not excepted. *Twyſden* and *Wylde* held this Caſe was not cured by the Statute. *Hale* ſeemed *contra*, & *Adjournatur*. But afterwards in *Michaelmas* Term the Verdict was ſet aſide, upon Affidavits that the Jury caſt Lots for their Verdict, and gave it as the Lot fell, and ſo the Exception was not determined.

* P. 140

Jury caſts Lots for their Verdict, ſet aſide therefore. Vide Poſt, 205. 2 Jo. 82. 3 Bac. Abr. 488. P. C. 221.

Buller N. P. 308. 2 Hale P. C. 296. 2 Hawk. P. C. 221.

Roe againſt *Williamſon*.

EJECTMENT, and declares upon a Leaſe for five Years, and upon *Non culp.* Jury found that the Leſſor of the Plaintiff had only a Leaſe for three Years, & *ſi*, &c. *Hale* held this Verdict was againſt the Plaintiff, for the Judgment muſt be, that the Plaintiff recovered *terminum ſuum prædictum*, which is five Years, whereas the Leſſor's Intereſt is not to continue ſo long, and perhaps the Defendant may have the Reverſion after the three Years expired, and ſo by this Means the Leſſor of the Plaintiff will recover the Land for two Years more than he hath Right to hold it. And he ſaid, That for this Reaſon he before cauſed another Plaintiff to be nonſuit. *Wylde* agreed with *Hale*, but *Twyſden* ſeemed of a different Opinion. *Et Adjournatur*.

Ejectment of a Leaſe for five Years, and the Leſſor had only a Term for three Years, S. C. 3 Keb. 490.

The *King* againſt *Parker*.

THE Coroner's Inqueſt *ſuper viſum Corporis*, found that *Parker Felonice ſeipſum* threw into a River, & *in Rivo præd. ſeipſum emergit*, & *ſic ſeipſum occidit & murdravit*: And this was quaſhed, becauſe *emergo* is

Coroner's Inqueſt finds that a Man *ſeipſum emergit & ſic ſeipſum murdravit*, quaſhed.

out of the Water, and not to drown himſelf in the Water; and the *Felonice* threw himſelf into the Water does not cure it, for the going into the Water does not make a Felony, but the drowning himſelf in the Water, and the Concluſion *& ſic ſeipſum occidit, &c.* ſignifies nothing, as * being without Premiſſes; and to ſay a Man murdered himſelf without ſhewing how, is inſufficient: But then it was moved what ſhould be done in this Caſe, for the Party being dead and buried for two Years, there could be no other View in this Caſe. *Et per Curiam*, That may be ſupplied by Commiſſion of Enquiry; or the Juſtices of Peace, or of Aſſize, may enquire of it without Commiſſion. But in either of theſe Caſes the Inquiſition is traverſable, though the Inquiſition of the Coroner himſelf in ſuch Caſe as the Law is now holden, is not traverſable. But *Hale* ſaid, That anciently the Coroner's Inqueſt was traverſable in this Caſe, but never in *fugam fecit*. And it was ruled in this Caſe, That the Death ſhould be preſented next Aſſizes at *York*, and the Inquiſition traverſed and tried the ſame Aſſizes, and ſo the Matter determined.

Inquiſition is traverſable, and the Coroner in all but in

* poſt, 152. 1 Vent. 239, 278. Sed 1 Sid. 90. & 101 contr.

Hutchinſon againſt *Thomas*.

Information for Uſury, the Defendant reads another Information the ſame Term.

S. C. 3 Keb. 426. 491. Poſt. 176. Ante 13.

INFORMATION for Uſury was thus: *Memorandum quod Termino Sancti Michaelis*, and ſo ſet forth the Uſury. The Defendant pleaded *quod ante exhibitionem hujus Informationis, ſcilicet Termino Sancti Michaelis* (the ſame Term) another Perſon exhibited an Information alſo againſt him for the ſame Uſury, and obtained Judgment againſt him: Upon which the Informer demurred, and had Judgment; for both Informations, as here pleaded, refer to the firſt Inſtant of the ſame Term. But if another Information was exhibited before, this ſame Term, he ſhould have pleaded that this Information was exhibited ſuch a Day of the Term, and that at another Day before in the ſame Term another Information was exhibited, and Judgment thereupon obtained.

Mayor

* Mayor, &c. of *London* againſt *Gorrey*. * P. 142

DEBT for Scavage, and declares upon a Patent of *Edw.* 4. The Defendant imparles, and in a Term after demanded *Oyer* of the Letters Patents [which after imparlance he ought not to have] the Plaintiff demurred *quia placitum præd' in barra placitat' minus ſufficiens, &c.* The Defendant rejoins, *quod placitum præd. eſt ſufficiens. Curia*, This was no Plea, and therefore does not warrant the Demurrer in this Form, *ideo* Judgment for the Defendant, *& non quod replacitent*, as was deſired.

The Defendant craves *Oyer*, the Plaintiff demurs, *quia placitum in barra minus ſufficiens*, and Judgment againſt him, becauſe his Demurrer was without Warrant. No Repleader. S. C.

1 Vent 298. 3 Keb. 677, Poſt, 174. Nul repleader. Vide 6 Mod. 2, 3. 103. 1 Lev. 32. 3 Lev. 40, 440. Ante 12. Poſt, 164.

Mottram againſt *Jolly*.

THE Caſe was, One granted to another twenty of his beſt Trees in his Wood, to be taken at the Grantee's Election within eleven Years: The Grantor cannot take any Trees in the mean Time, at leaſt not without a Requeſt to the Grantee to make his Election; and this is not like to *Palmer*'s Caſe in 5 *Co.* a Grant to take twenty Loads of Wood out of his Wood, for there all is Wood, and if he leaves ſufficient for the Grantee to have his twenty Loads it is enough: But here it is the twenty beſt Trees, ſo that until he hath made his Election of what he'll take for the beſt, the Grantee cannot take any. Adjudged.

Grant of 20 of the beſt Trees he has in his Wood, to be taken, by the Grantee within 11 Years, the Grantor cannot take in the mean Time. S. C. 1 Vent. 271. 1 Danv. 807. pl. 9. 2 Danv. 760. pl. 7. 3 Keb. 477.

5 Co. 25. Noy 32. Cro. El. 82. Yelv. 188.

Skillington againſt *Norton*.

TRESPASS, a Special Verdict found Stat. 14 *Car.* 2. 12. That whereas the Pariſhes in *Lancaſhire, Yorkſhire, Derbyſhire*, and other Counties there particularly named, and then hath the general Words

Stat 14 *Car.* 2. appoints Collections for Poor by Townſhips in *Lancaſhire, Yorkſhire*

and *Derbyſhire*, this extends to no other Counties. S. C. 3 Keb. 422, 460, 494, 539.

* P. 143

Vide 2 Salk. 486. 487, 501, 527.. Ante 103. 4 Mod. 157, 158. 1 Mod. 251. 2 Mod. 237.

and other Counties, are ſo large, that Diſtributions to poor People cannot ſo conveniently be by Pariſhes a Stat. 43 *Eliz.* appoints, and therefore this Statute appoints the Proviſion and Diſtribution ſhall be by *Townſhips, and that the Pariſh of *Kenilworth in Com. Warwick* (being none of thoſe Counties named in the Statute) is a large Pariſh, having two Townſhips; but it does not find it ſo large that Diſtribution parochial cannot be well made. And the Queſtion was, Whether the County of *Warwick*, which is not named in the Statute, ſhall be taken within the general Words, *and divers other Counties?* And *Hopkins* Serjeant, cited a Caſe to be adjudged *in Com. Banc* two or three Years ago, that the Statute extends not to other Counties, than thoſe there expreſly named: And to this *Hale* inclined, but the Court deſired to ſee that Precedent before they gave Judgment, for which it was adjourned. But afterwards in *Michaelmas* Term it was adjudged, The Statute extends not to any other Counties, but thoſe only which are named in the Statute.

Hodgſon againſt *Thornborough.*

Copyholder leaſes for 16 Years, rendering Rent, the Leſſee leaſes Part for ten Years without Rent, the laſt Leſſee aſſigns his Term to the firſt Leſſor, he ſhall have the whole Rent, without Extinguiſhment or Apportionment. S. C. 3 Keb. 500, 505, 518, 541, 557.

COPYHOLDER made a Leaſe for ſixteen Years, rendering 20 *l.* Rent, the Leſſee made a Leaſe of Part for ten Years, rendering no Rent, the Under-Leſſee aſſigned his Term to the firſt Leſſor: And whether the Rent of 20 *l.* ſhall be ſuſpended or apportioned? was the Queſtion. And it was adjudged, That the Rent ſhall neither be ſuſpended nor apportioned, but that the Leſſor ſhall have the whole Rent of 20 *l. per Annum* againſt the Leſſee; and *Hale* ſaid, That if the Leſſee had reſerved 5 *l.* Rent upon his Leaſe for ten Years, and he had aſſigned to the Leſſor without reſerving Rent, the Leſſor ſhould have 20 *l.* from his Leſſee, and the Leſſee ſhould have 5 *l.* from the Under-Leſſor, and the Under-Leſſor nothing againſt the firſt Leſſor, for each one ſhall have according to his Contract, and there ſhall be no Apportionment againſt the Contract and Agreement of the Parties: Alſo there can be no Suſpenſion or Extinguiſhment of the Rent of 20 *l.* for that is always where the Leſſor enters wrongfully againſt the Will of the Leſſee; and ſo *Wylde* ſaid

are

are all the Pleadings, *ſcilicet*, that the Leſſor *vi & armis* entered: But in this Caſe all is done by the Agreement and Contract of the Parties, and therefore every one ſhall enjoy according to his Agreement. And *Twyſden* ſaid, That what *Coke* ſays, That a Rent-Service cannot be ſuſpended in Part, and in *Eſſe* for Part, is without * Reaſon, and without Authority: And all the Court *ſcilicet Hale*, *Twyſden*, *Rainsford* and *Wylde* agreed, That the Leſſor ſhould have the whole Rent againſt the Leſſee, and he nothing againſt his Under-Leſſee, becauſe nothing is reſerved by him, nor ſhall the Under-Leſſee have any Thing from the firſt Leſſor for the ſame Reaſon; for which they cited 17 *E.* 3. 16. *vol* 56. *Co. Litt.* 148. *b.* 1 *Rolle's* 938. *Dorrell* againſt *Andrews*, 16 *E.* 3. *Anno* 93. *Brook's Extingu.* 48. and the third Reſolution in *Rawlins's* Caſe, which they ſaid is not a Point that judicially ariſes in the Caſe, but a collateral Opinion. * P. 144

Hill againſt *Mountague.*

CASE againſt the Defendant, Capital Bailiff of *Weſtminſter*, for an Eſcape upon a mean Proceſs. The Defendant pleaded a Reſcous, but not that he returned the Reſcous; upon which the Plaintiff demurred, and Judgment for the Defendant, according to the Caſe of 2 *Cro.* 419. and *Waldon* and *Lambert's* Caſe there cited at the End thereof; for it is a good Plea upon mean Proceſs, though not upon an Execution; and the Plea was adjudged good, though he does not ſhew a Return of the Reſcous. *Levinz* for the Defendant.

Eſcape on mean Proceſs, Defendant pleads a Reſcous, but no Return. Q. 1 Mod. 57, 244. Vide 1 Lev. 214. Ante 28. Bull. N. P. 59. 2 Wils. 294. Imp. Sh. 188.

Seaſon againſt *Gilbert.*

ASSUMPSIT, The Defendant pleaded *Non Aſſumpſit*, and upon the Trial before *Hale* in *Middleſex*, the Defendant was permitted to give in Evidence Infancy at the Time of the Promiſe, whereupon the Plaintiff was nonſuit. *Jones* Attorney General, and *Levinz* for the Plaintiff at the Trial.

Iſſue *Non Aſſumpſit*, Evidence Nonage. Bull. N. P. 152.

Horſey

* P. 145

* *Horſey* againſt *Daniel.*

Debt upon Obligation, counting of a *Devaſtavit*, lies not againſt an Executor, *aliter* upon a Judgment. A *Devaſtavit* cannot be by a Feme Covert. S. C. Poſt, 261. Vide 1 Vent. 355. & ibid. 315, 321. 2 Show. 55, 56. Poſt, 189, 209. 1 Lev. 147, 255, 256. Ante 40, 110, 133, &c. Poſt, 209, 245.

DEBT upon an Obligation againſt Huſband and Wife Executors, and declares upon a *Devaſtavit* by them; and upon Demurrer Judgment was given againſt the Plaintiff: For *Firſt*, A Feme covert cannot waſte during the Coverture, though the *Devaſtavit* of the Huſband will charge her, if ſhe ſurvive, according to *Beamond* and *Long*'s Caſe, and 1 *Cro. Monſon* and *Bourn*'s Caſe. *Secondly*, The Court would not carry this Action farther than it has already been allowed, and that is, in Debt upon a Judgment, but not in Debt upon an Obligation; and *Mich.* 29. *inter Eaſt* againſt *Withers*, It was adjudged that Debt upon an Obligation, counting of a *Devaſtavit*, lay not againſt an Executor.

* P. 146

* Term. Sanct. Mich.

ANNO

27 Car. II. in Banco Regis.

Lavender againſt *Blackſtone.*

Of fraudulent Conveyances. S. C. 3 Keb. 526, 826. Vide ante, 70, 71. Poſt, 148. 2 Show. 46. 3 Keb. 840, 858. 1 Mod. 76, 119.

EJECTMENT upon *Non Culp.* was tried at Bar. *Ambroſe Pudſy* ſeiſed in Tail, being under the Age of twenty-one, *ſcilicet* of the Age of twenty Years, in the Year 1649, married the Daughter of Sir *Thomas Daviſon*, and had with her a Portion of 2000*l.* Afterwards in the Year 1653. *Pudſy* being extravagantly in Debt 4000*l.* for which Sir *Thomas Daviſon* was bound; Sir *Thomas Daviſon* procured *Pudſy* to levy a Fine, (wherein his Wife joined not) of all his Lands, to the Uſe of *Samuel Daviſon* and *Gaſcoign Eden*, and their Heirs; in Truſt that they with Conſent, and at the Requeſt

Requeſt of Sir *Thomas Daviſon*, ſhould ſell all or any Part of the Lands; the Money raiſed thereby to be employed for Payment of all Debts, for which Sir *Thomas Daviſon* then was, or within fifteen Years after, ſhould be bound for *Pudſy*: And *Secondly*, Of all ſuch Damages as Sir *Thomas Daviſon* ſhould ſuſtain hereby: And *Thirdly*, Of all ſuch proper Debts of the ſaid *Pudſy*, [not ſuch as he was ſubject to as Surety for others] as were then due, and ſhould be certified by *Pudſy* and his Creditors within a Time limited; the Remainder of the Money, if any, to be paid to *Pudſy*, and the Remainder of the Land, if any, left to *Pudſy* for ninety-nine Years, if he ſhould ſo long live; the Remainder to *Samuel Daviſon* and *Eden*, and their Heirs, for the Life of *Pudſy*; the Remainder to the firſt and other Sons of *Pudſy* in Tail, the Remainder to the right Heirs of *Pudſy*. *Proviſo*, *Firſt*, That *Pudſy* may make a Jointure for this or any other Wife for Life, not exceeding 300*l.* *per Annum*. *Secondly*, That he may grant Rent-charges to the younger *Children. *Thirdly*, That with the Conſent of the ſaid Sir *Thomas* and *Ralph Daviſon*, he may make Leaſes of all or any Part of the Lands for any number of Years, with or without any Rent. A great Part of the Land to the Value of 1200*l.* was ſold, and *Pudſy* and the Truſtees joined in the Sale, and Debts to the Value of thoſe for which Sir *Thomas* was bound, and that were the proper Debts of *Pudſy* himſelf, were paid with the Money. Afterwards he being in Poſſeſſion of the Reſidue, (as by the Deed was provided, ſo long as he paid the Intereſt) ſold 400*l.* *per Annum* by himſelf ſolely, which the Purchaſer enjoyed many Years together, without Interruption or Diſturbance of the Truſtees. And in the Year 1667, he mortgaged the Manor of *Belton*, the Land now in Queſtion, having ſpent all the reſt of his Eſtate, to *Gudgeon*, who in the Life-time of *Pudſy*, entered and aſſigned to *Blackſtone*. *Pudſy* died, and the Leſſor his Son and Heir brought an Ejectment, and recovered at *York* Aſſizes, the Jury finding the Settlement aforeſaid to be good, and not fraudulent. Whereupon *Blackſtone* the Aſſignee of *Gudgeon*, brought a new Ejectment, and the Trial was now at Bar; wherein the Jury by Direction of the whole Court, found for the Plaintiff, becauſe the ſaid Settlement was fraudulent and void againſt the Mortgagee for theſe Reaſons: For *Firſt*, The

* P. 147

Badges of Fraud.

The Continuance of Poſſeſſion, and the Sale of 40*cl.* *per Annum*, by himſelf ſolely, notwithſtanding the Truſtees joined in the Sale of the other Part, was a Badge of Fraud. *Secondly* The *Proviſo* to make Leaſes for any Term without Rent, with Conſent of the Truſtees, puts it in his Power to defeat the whole Settlement, and thoſe were Truſtees of his own voluntary Nomination. But whether this Power gives him Power to make Leaſes preſently, and during the fifteen Years, was not reſolved. *Thirdly*, The Wife did not join in the Fine, and therefore continues dowable: But if ſhe had joined, it might have made the Settlement to be upon good Conſideration, which otherwiſe is merely voluntary. *Et per Hale*, every Conveyance *prima facie* ſhall be deemed fraudulent againſt a Purchaſer, but Circumſtances may alter the Caſe. *Fourthly*, Though it was proved that *Pudſy* upon the Marriage promiſed to ſettle his Eſtate when he came to Age upon himſelf and his Iſſue, (which it was agreed, was a ſufficient Conſideration to avoid Fraud, though an Infant by Law is not compellable to fulfil his Promiſe) yet this Settlement not being made till three or four Years after he came of Age, and not being * made directly according to the ſaid Promiſe, it ſhall not be preſumed to be made in Performance of the Promiſe, without a direct Proof to that Purpoſe.

Every voluntary Conveyance is *prima facie* to be eſteemed fraudulent againſt Purchaſers, but Circumſtances may alter the Caſe. Promiſe by Infant on his Marriage to ſettle when of Age, a Settlement made accordingly, is not fraudulent.

* P. 148

Clerk againſt *Nettleſhip*.

Promiſes to leave his Wife 400*l.* if ſhe will ſell her Land and let him have the Money, his Obligation for the 400*l.* not fraudulent.

Ante 70, 146.

AT *Guildhall* upon Evidence at a Trial before *Hale*, the Caſe was thus: The Wife having Land as Heireſs, and the Huſband being a Tradeſman, and in Debt, he promiſed his Wife, That if ſhe would join with him in a Sale of the Land, and permit him to receive the Money for the Uſe of his Trade, to leave her 400*l.* at his Death: They ſold, and he had the Money, and ſix Months after being ſickly and conſumptive, he made an Obligation to a Stranger, conditioned to pay his Wife 300*l.* after his Death, and two Months after died. And by the Direction of *Hale* Chief Juſtice, the Jury found the Obligation not fraudulent *quoad* Creditors, though in Law a Man cannot make a good Promiſe to his Wife, and though the Obligation was made ſo long afterwards.

St.

St. John againſt *Moody.*

CASE *quod cum* the Plaintiff 27 *Feb.* 27 *Car.* 2. was ſeized in Fee of a Wood; the Defendant *machinans* to diſturb him of the Profit thereof, *dicto* 27 *Febr. in quodam clauſo vocat.* Lorkdowne, *viam ipſius* the Plaintiff *ducent' a præd. boſco par & trans præd. clauſum uſque* D. *quam ipſe* the Plaintiff *adtunc & abinde hucuſque pro ſe, ſervis and carriagiis ſuis* for the neceſſary Uſe of the ſaid Wood *per totum tempus præd. de jure habuiſſe debuit, obſtruxit & quandam foſſam ex tranſverſo viæ præd. fodit & fecit, per quod ipſe* the Plaintiff, *via prædicta uti vel habere non potuit:* After Verdict for the Plaintiff upon *Non Culp.* it was moved in Arreſt of Judgment, That here is no Preſcription, nor any Title whatſoever made to this Way; and ſo the Defendant cannot know what Defence to make at the Trial, and therefore the Declaration is not good; it is not ſhewed * that ever he had Poſſeſſion of the Way, but only *quod cum de jure habuiſſe debuit*; which in ſetting forth his Title is not ſufficient, as it might be in ſhewing the Title of another Perſon to whom he is a Stranger.—But *Hale & Curia* held it good, eſpecially after Verdict, and they compared it to the Caſe of a Water-courſe, *que currere conſuevit*; and *Twyſden* held it good upon Demurrer; whereupon they gave Judgment for the Plaintiff. The Defendant brought a Writ of Error *in Cam. Scaccarii*, and the Judgment was affirmed. *Pollexfen* for the Plaintiff, *Levinz* for the Defendant in both Courts: *Vide poſtea* ſuch Declarations held good upon Demurrer.

Caſe for diſturbing him in his Way *quod habere debuit*, without Preſcription or other Title. S. C. 3 Keb. 529. 1 Vent. 274. Poſt. 493. 6 Mod. 116, 193. 315. Vide 1 Lutw. 119, 120. Nelſon's Lutw. 43, 43.

* P. 149

Wigſon againſt *Garret.*

A SETTLEMENT was by Deed with Power to revoke by Indenture ſealed in the Preſence of three Witneſſes. Afterwards the Party without taking Notice of his Power, covenanted by Indenture ſealed in the Preſence of three Witneſſes, to levy a Fine to other Uſes, and levied the Fine accordingly. And after divers Arguments it was adjudged by *Hale* and the whole Court, to be a good Revocation; and yet the Covenant of itſelf will not do it, becauſe it neither paſſes an Eſtate

Power to revoke by Indenture ſealed in Preſence of three Witneſſes, he by Indenture covenants to levy a Fine to Uſes, good Revocation.

S. C. 2 Vent. 278, 280. Raym. 239. 2 Keb. 366, 489 &c. Ante 127. 1 Lev. 30. & Bath & Montague, 3 Chan. Cases.

Eſtate not raiſes a Uſe; and the Fine itſelf will not do it, for that is not an Indenture ſealed in the preſence of three Witneſſes; yet both together make a good Conveyance and Revocation of the Uſe. This Caſe concerned ſome part of the Eſtate of the Earl of *Leiceſter*. Alſo it was ſaid by *Hale* in this Caſe; If there be Tenant for Life with Power to make a Leaſe for Life, his Leaſe for Life without Livery is good, and better than if Livery be made: And ſo upon great Deliberation it was reſolved in the Caſe of one *Rogers*. *Twyſden* ſaid Livery in ſuch Caſe has been held to be a Forfeiture, which *Hale* denied, for by the ſealing of the Deed the Power is executed, and the Livery void.

Vide poſt 156.

* P. 150

* *Snell* againſt *Webing*.

I know what I am, I know what Snell *is, I never buggered a Mare*; actionable by Implication. S. C. 1 Vent. 276.

ACTION, for that the Defendant *habens colloquium* of the Plaintiff ſaid, *I know what I am, and I know what* Snell *is, I never buggered a Mare*. After Verdict upon *Non Culp.* for the Plaintiff, it was moved in Arreſt of Judgment, That the Words are not actionable, for they do not charge the Plaintiff with Buggery. *Curia contra*, It is by Implication a Charge of Buggery upon the Plaintiff, which the By-ſtanders *ſatis intellexerunt*, and gave Judgment for the Plaintiff.

Waker againſt *Wakeman*.

Settlement of Lands and Tithes with a Power to make Leaſes, ſo that 5*s. per* Acre Rent be reſerved, he leaſes reſerving 5*s. per* Acre for the Lands, but nothing for the Tithes. S. C. 1 Vent. 294. 3 Keb. 544, 547.

SETTLEMENT for Life with Remainders over, *Proviſo*, That Tenant for Life may make Leaſes of all or any part of the Premiſſes, ſo as upon every Leaſe he reſerved 5*s. per* Acre for every Acre of the Premiſſes ſo demiſed; and the Settlement was of divers Lands, and alſo of a Rectory, conſiſting only of Tithes without Glebe. He made a Leaſe of the whole, rendering Rent, which amounted to more than 5*s. per* Acre for all the Lands, but nothing for the Tithes. And whether this was a good Leaſe of the Rectory? was the Queſtion upon Demurrer. *Saunders* argued that it was, Becauſe the Power is affirmative to make Leaſes, and the Reſtraint comes under the *ſo that*, &c. and that cannot be extended to render Rent by the Acre, of that which does

does not conſiſt in Acres; he cited *Rolle*, Tit. *Power*, 262. as ſo reſolved. *Pemberton*, King's Serjeant, *contra*, The uſual Powers to make Leaſes are in the affirmative, as in this Caſe, and the Reſtraint under a *ſo that*, &c. and though, as here, the ancient Rent be reſerved, yet it is always held, that Lands never demiſed cannot be demiſed, and yet it might as well be ſaid in theſe Caſes, that the *ſo that the ancient Rent be reſerved*, cannot be intended to render the ancient Rent where no Rent was before rendered. *Et adjournatur. Sed poſtea* in *Hillary* Term following Judgment was given that the Leaſe was good, only upon the Authority of the Caſe in *Rolle* before cited. But *Hale* ſaid, *Si res eſſet integra*, he ſhould be perhaps of another Opinion. * P. 151

The *King* againſt *Watts*.

INFORMATION againſt him for uſing the Office of Bailiff in arreſting *J. S.* upon a Writ out of this Court, not having taken the Oath appointed by Stat. 27 *Eliz.* 12. After Verdict Judgment was ſtayed, becauſe it is not alledged that he was a general Bailiff, and a Special Bailiff is not within the Statute, *Jones Rep.* 249, and here the Defendant ſhall be taken to be a Special Bailiff, becauſe the Charge againſt him is only for one ſingle Act. The Court inclined to this Opinion, and ſtayed the Judgment for the preſent; *Sed adviſare volunt.*

Special Bailiff not within the Stat. 27 *Eliz.* 12. of taking an Oath to execute the Office.

Ellis againſt *Ruddle*.

DEBT upon an Obligation conditioned to perform Covenants in a Demiſe of the Bailiwick of the *Savoy*, by which *inter alia*, he demiſed to the Defendant the Goods of Felons, Waifs, Eſtrays, &c. and made the Defendant his Deputy Baily, rendering 60*l.* Rent *per Annum*. And upon Demurrer the Court held the Indenture void within the Statute of *Edward* 6. againſt Emption of Offices; for though *Bona Felonum*, &c. may be legally demiſed, yet being joined with the making the Defendant Deputy Bailiff, and a Demiſe of the Bailiwick to him, the whole is void. But becauſe the

Leaſe of a Bailiwick rendering Rent, void.

Offices in Fee not within the Stat. *Edw.* 6. nor Grants for Life or Years of them, rendering Rent. 4 Com. Dig. 299. 3 Bac. Abr. 730. 1 Hawk. P. C. 313.

the Truth of the Matter was, That the King was ſeiſed in Fee of the Bailiwick, and demiſed to the Plaintiff, who demiſed to the Defendant; and Offices in Fee are excepted out of the Statute, whereby under Leaſes of ſuch Offices are alſo excepted incluſively, and for that the Seiſin in Fee of the King does not appear upon Record, the Court ordered a Repleader.

* P. 152 * The *King* againſt *Aldenham*, Alderman of *Rowel*.

Coroner's Inqueſt of *Felo de ſe* traverſable, but not of *fugam fecit*. For want of the Word *Murdravit* quaſh'd. and a new Inqueſt to be before Juſtices of Peace. Vide 1 Vent. 182. 278, 352. 101. cont.

THE Coroner's Inqueſt having found him *Felo de ſe*, his Executors moved they might traverſe the Inquiſition. *Et per Hale, Twyſden* and *Wylde, ſilente Rainsford*, it was granted; for the Coroner's Inqueſt finding one *Felo de ſe* is traverſable, 8 *E. Bro Traverſe fans ceo* 229. But a *Fugam fecit* found before the Coroner is not traverſable: Afterwards the Inqueſt was quaſhed for want of the Word *Murdravit*. And a new Inquiſition was appointed to be taken before Juſtices of Peace.

Ante 140, 141. 3 Inſt. 55. Poph. 209 1 Roll. Rep. 217. 2 Sid. 90.

Wiſe againſt *Wiſe*.

Aſſumed to pay him the 20*l.* which he owed him by Agreement *inter eos fact.*

ASSUMPSIT by an Executor, and declares that the Defendant being indebted to the Teſtator 20*l. quas illi ſolviſſe debuiſſet ſecundum agreamentum inter eos habit'* promiſed to pay. After Verdict for the Plaintiff upon *Non Aſſumpſit* Judgment was ſtayed; for this is no more than a general *Idebitatus Aſſumpſit*, becauſe it does not appear what the Agreement was, by Deed or without Deed, by Obligation, or how.

Edlin againſt *Battaly*, in Chancery.

Chancery relieves a Purchaſer of a Term, who had been at Charge in building againſt an old dormant Title.

BRAY poſſeſſed of a Term for 100 Years, in 1638 made his Will, and *Taylor*, who married his Daughter, Executor; and deviſed the Term to his own Wife; the Executor aſſented, ſhe entered, *&c.* and after three Years died. After her Death the Executor entered, and enjoyed the Term till 1650, and then ſold it

to

to one who ſurrendered and took a new Leaſe for 200 Years, and laid out 250*l.* in building upon the Premiſſes. *Taylor* died, and his Wife ſurvived him till the Year 1669. *Battaly*, who married the Daughter of *Taylor*, being beyond Seas 20 Years, and not knowing of his Title, came into *England* in 1670, and being informed of this whole Matter, and of his Title in Right of his Wife, * took Adminiſtration to the Wife of *Bray*, and Grandmother to his Wife, and recovered by Virtue of the Term for 100 Years in an Ejectment. The Purchaſer and Builder exhibited his Bill to be relieved againſt this dormant Title; and by *Grimſton* Maſter of the Rolls; The Poſſeſſion going ſo long, and divers Purchaſers, and the laſt Purchaſer under the new Term having no Notice of the old, or of the dormant Title to the reſidue of the Term of 100 Years: Adjudged the Purchaſer ſhould be relieved and hold the Land till he be repaid his Charges in building, diſcounting the Profits received by the Purchaſe; which *Battaly* perceiving, and that the Value would not exceed 22*l. per Annum*, and that the reſidue of the old Term was only for 32 Years, he agreed (by Advice of the Maſter of the Rolls) to take 80*l.* of the Purchaſer, and to releaſe his Title to the old Term.

Vide Ante 21, 146. 1 Lev. 48. 1 Mod. 86, 300, &c.

* P. 153.

Fowk againſt *Pinſacke.*

ASSUMPSIT, and declares the Defendant was *indebitatus* 20*l. pro præmio* upon a Policy of Inſurance upon ſuch a ſhip; the Defendant demurred ſpecially, becauſe he doth not ſhew the Conſideration certainly, what the *præmium* was, or how it became due: *Sed non allocatur*; for this is as good as an *indebitatus pro quodam ſalario*, which has been adjudged good.

Indebitatus Aſſumpſit pro præmio upon a Policy, or *pro ſalario.* Vide 1 Salk. 22. Vide ante 3, 17, Poſt, 198. 1 Lev. 164, 165. 272.

Term.

Term. Sanct. Hill.

ANNO

27 & 28 Car. II. in Banco Regis.

Piggot againſt the Earl of *Saliſbury*.

Feme Tenant for Life, Remainder to *J. S.* in Tail, Remainder to the Huſband for Life, Remainder over, Baron and Feme *per* Fine *ſur conceſſit* grant *tenementa præd' pro vita*. Baron and Feme with Warranty, which deſcends to *J. S.* Whether an Eſtate for the Life of Baron and Feme paſs by the Fine, or ſeveral and diſtinct Eſtates for their ſeveral Lives? S. C. 2 Mod. 109. 2 Jo. 88. 3 Keb. 695, 698. 4 Bac. Abr. 296. 3 Com. Dig. 350.

EJECTMENT upon the Demiſe of Sir *Thomas Leigh de* 32 *Meſſuagiis in Parochia Sancti Martini in Comm. Midd.* upon *Non Culp.* Trial at Bar, and a Special Verdict found, the Caſe was this: *William Mintern* ſeiſed in Right of his Wife *Bridget*, of a Reverſion in Fee upon a Term for Years; they ſettled the Tenements in Queſtion to the Uſe of *Bridget* for Life; the Remainder to *Francis Leigh* an Infant under the Age of twenty-one, and *Elizabeth* his Wife, the Daughter of *Mintern*, and Wife and Heirs of *Francis* upon *Elizabeth* begotten; the Remainder to *William Mintern* for Life; Remainder to the right Heirs of *Bridget*: *W. Mintern*, and *Bridget*, afterwards *viz.* 7 *Jac.* by Fine *ſur conceſſit conceſſerunt Tenementa & totum & quicquid habent in Tenementis prædictis ad terminum vitæ ipſorum Willielmi & Brigittæ & eorum diutius viventis, & illa reddiderunt al Haughton & Duncomb, tenend' ſibi & hæredibus ſuis per totam vitam Willielmi & Bridgittæ & eorum diutius viventis* with Warranty, and this was in Truſt for *Robert* Earl of *Saliſbury*, who intended to purchaſe the Inheritance; upon which Fine Leſſee for Years attorned. And afterwards *eodem Term.* 7 *Jac.* Sir *Oliffe Leigh*, Father of *Francis*, and *William Mintern* and *Bridget* levied a Fine *ſur conuſance de droit* to the Earl of *Saliſbury*, with Warranty by Sir *Oliffe*, which deſcended upon the Leſſor, Son and Heir of Sir *Francis*, Son and Heir of Sir *Oliffe*; and whether Sir * *Thomas* the Leſſor be barred by this collateral Warranty of Sir *Oliffe*, deſcended

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on

on him? was the Queſtion. And all depended upon the Fine *ſur conceſſit*, of what Operation that is; for if that inure as a Grant of the Eſtate in Poſſeſſion for the Lives of *William* and *Bridget*, then it diſplaces the Remainder to *Francis*, and makes way for the Warranty to bar; But if it paſs only the Eſtate for Life of *Bridget* in Poſſeſſion, and the Remainder of *William* for Life, as a Remainder, then it does not diveſt the Eſtate of *Francis* in Tail, and ſo that is not barred by the Warranty: And it was argued at Bar for the Plaintiff, that only the Eſtate for Life of *Bridget*, and the Remainder of *William*, as a Remainder, paſs in this Caſe, and not an Eſtate for Life of *William* and *Mary* in Poſſeſſion. *Firſt*, Becauſe the Words *& totum & quicquid habent* will otherwiſe ſignify nothing in the Fine; for a Grant *de tenementis prædictis* for the Life of *William* and *Bridget*, had been ſufficient to paſs an Eſtate for their two Lives in Poſſeſſion. But the Words *& totum & quicquid habent* were added to qualify the foregoing Words that the Grant might only paſs *totum & quicquid habent in tenementis*; and it was ſaid to be uſual in Fines *ſur conceſſit*, when the Grantor hath an abſolute Eſtate in Fee, to grant *Tenementa prædicta*: But when he hath a particular Eſtate, then to add *& totum & quicquid habent*; and in *Altham's* Caſe & *Co.* particular Words put after general, qualify the general; as if a Feme dowable of Lands in *D.* and *S.* releaſe to him in Reverſion all Demands *necnon dotem ſuam in D.* this does not releaſe her Dower in *S.* *Secondly*, Where Words are doubtful, they ought to be taken in ſuch a Senſe as no Wrong be done; as if Tenant in Fee leaſe for Life, and does not ſay for whoſe Life, it ſhall be taken for the Life of the Leſſee; But if Tenant in Tail or for Life makes a Leaſe for Life, without expreſſing for whoſe Life, it is a Leaſe for the Life of the Leſſor; and the Law regards a leſſer Eſtate by Right, more than a greater Eſtate by Wrong, 6 *E.* 3. 17. *Co. Lit.* 42. *a.* 182. *a. b.* *Thirdly*, Such Conſtruction ought to be made in this Caſe, becauſe the Party ſeemed to intend ſo to paſs the Eſtates; for otherwiſe a fine by *William* and *Bridget*, and Sir *Oliffe Leigh* had been ſufficient, and they need not have levied two Fines of the ſame Term, which cannot be for any other Purpoſe than to prevent a Forfeiture of Eſtate to *Francis*, then an Infant, and no Party to the Fines, if they had granted the whole Eſtate

1 Term. Rep. 738.
Cowp. 179.
Vide 1 Roll. Abr. 632, 633.
2 Danv. 572, 573, &c.
Q. 1 Co. 76, 77.
Co. Lit. 302, 332, &c.
Cro. Car. 320, 387. 405.
1 Roll. Rep. 311.
1 Jo. 323, 324.
Dyer 334.
6 Co. 15.
Cro. El. 36, 135, 827.
Mo. 634.
Owen 129.
2 Jo. 58, 68.
1 Lev. 37, 49.
2 Saund. 386, 387.
2 Mod. 109, 289.
3 Lev. 39, 154. 202.
3 Lev. 454.

Eſtate in Poſſeſſion; for thereby they have deveſted the
* P. 156 Eſtate of *Francis*, and given to * him Title of Entry, for by the Attornment of the Tenant for Years, the Fine *ſur conceſſit* was executed, as was agreed *per omnes*, and the Eſtate veſted as if Livery had been made. *Finch contra*, The Words of the Fine paſs an entire Eſtate for the Lives of *William* and *Bridget*, and they ought not therefore to paſs by Fractions; and it is not to be conſidered what the Parties intended to do, but what they have done; he cited 1 *Co. Rep. Bredon's* Caſe, 1 *Cro. Baker v. Hacking*, *Style*, *Garret v. Eliſard*. And this Fine is well executed by the Attornment, and therefore it deveſts the Remainder to *Francis*, whereby the Warranty deſcending upon Sir *Thomas* his Heir, he is barred by the Warranty, being collateral to his Title. *Hale* and *Wylde* held clearly, The Intent of the Parties here was to prevent a Forfeiture, and therefore not to deveſt the Eſtate in Remainder, But whether the Operation it ſhall have, whether to paſs an entire Freehold for both their Lives, or one divided Eſtate, they would conſider, & *Adjournatur*. Afterwards the Caſe being long delayed by Privilege of Parliament, Sir *Tho. Leigh* took 2000*l.* of the Earl of *Saliſbury*, and conveyed his Title to him; and in Truth as it ſeems the Earl was to purchaſe the Eſtate, for he had built upon it all the Houſes in Queſtion: But Sir *Francis* being under Age could not join, whereupon this Conveyance was deviſed for the preſent, and Sir *Francis* died afterwards without joining. *Levinz pro querente*. *Note*, The Parties afterwards agreed.

Style 192, 193. 1 Roll. 855.

Terry againſt *Stradwicke*.

Treſpaſs for entering his Cloſe, and taking a load of Hay, not ſaying *ipſius fœnum*, naught after Verdict. S. C. 1 Vent. 278. 3 Keb. 524. Vide ante 20, 2 Show. Caſe 365. & p. 329. 1 Sid. 184 ſt. 303.

CASE, for that the Defendant obſtructed a Watercourſe, and turned the Water into the Plaintiff's Land, whereby it was overflowed & *viginti carectat' fœni adtunc & ibid. exiſtent' corrupt't fuerunt*. After Verdict for the Plaintiff upon *Non Culp.* and entire Damages, Judgment was now ſtaid upon the Motion of Serjeant *Hardreſs*, becauſe it is not ſaid *fœni ipſius* the Plaintiff, and ſo it does not appear to whom the Hay belonged: *Et nil capiat per Billam* entered. And in another Caſe *Mich. Term. ante, inter Holland & Ellis* in

Treſpaſs

Treſpaſs for entering his Cloſe, & *blada, viz. tant' carucat' de Wheate adtunc & ibidem exiſtent' cum averiis depaſt' fuit,* Judgment was alſo ſtayed for want of ſaying *blada ipſius* the Plaintiff, and yet in both * Caſes the Hay and Corn were in the Cloſes of the Plaintiffs; whereupon it was objected they ſhould be intended the Hay and the Corn of the Plaintiffs: *Sed per Curiam,* That is not ſufficient. And *Jones* Attorney General, who ſaid, he would move the Caſe of *Helland* again, upon this Judgment in *Terry's* Caſe, did not move it.

Vide 2 Show. 329, 395. Nelſon's Lutw. 485, 486.

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Comberford againſt *Birche.*

THIS Caſe came out of Chancery by Direction of that Court, to have the Opinion of the Court here in this Point; and upon Demurrer in this Court the Caſe was, *William Comberford* being ſeiſed of the Lands in Queſtion, 3 *Car.* 1. ſettled them to the Uſe of himſelf for Life, Remainder to *John* and *Robert,* and others his Brothers ſucceſſively in Tail male, Remainder to the Leſſor of the Plaintiff, with Power of Revocation. And afterwards 16 *Car.* 1. he revoked and made a new Settlement to the Uſe of himſelf in Tail, and afterwards to Truſtees, and of the Reſidue to make Leaſes for twenty-one Years upon certain Truſts, to make Proviſion for the Children of his Brothers, and in default of them to make Proviſion for his own Siſters; and in Caſe none of his Brothers or Siſters, or their Children be living, then immediately, or after the Term of twenty-one Years expired, to the Uſe of *John, Robert,* and others his Brothers ſucceſſively in Tail male, Remainder to the Leſſor of the Plaintiff *ut ante. William* died without Iſſue, *John, Robert,* and the other Brothers without Iſſue male. But there are Daughters of *John* and Siſters of *William* ſtill living. And whether any Eſtate ſhould riſe to the Leſſor of the Plaintiff? was the Queſtion: It was argued for the Plaintiff, That the Clauſe *if none of his Brothers or Siſters, or any of their Children be living, that it ſhall remain to* John *and* Robert, who are his Brothers, is impoſſible, and to be rejected rather than the whole Settlement of the Remainders defeated; and the Intention

Settlement, *Proviſo,* That if none of his Brothers or their Children be alive, then immediately, or after the Term for 21 Years, to remain to his Brothers ſucceſſively, two of his Brothers died, the other alive, the Term expired, yet it ſhall not remain to the Brother. S. C. 3 Keb. 543, 548.

of *William*, which for thirteen Years together was to have ſuch Remainders, appears by both Conveyances, and this Part of the Disjunctive, *then immediately*, depending upon the impoſſible Clauſe precedent, *ſcilicet*, *if none of my Brothers or Siſters, or their Children be living*; the Conveyance may take Effect well enough upon the other Part of the Disjunctive, *ſcilicet*, *or after the Term of* 21 *Years*; * and ſo the Conveyance may well ſtand, and all the Remainders ariſe upon the Determination of the Term of twenty-one Years; and ſo the Plaintiff hath good Title. But it was anſwered and reſolved by the Court, That all is one Sentence and on Condition precedent, *if none of his Brothers or Siſters, or any of their Children be then living*, which Condition is not in this Caſe, and ſo all the Remainders void; whereupon Judgment was given for the Defendant. *Levinz* Counſel for the Plaintiff, *Weſton* for the Defendant.

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Plummer againſt *Whitchcott*.

Warden of the *Fleet* in Fee grants the Office for Life to *A.* who ſuffered Eſcapes, and is not reſponſible; the Warden in Fee is liable.
S. C. 1 Vent. 314. 325.
2 Jo. 60, 61.
2 Mod. 119, to 128.
3 Keb. 591, 656. &c.

DEBT againſt the Defendant as Superior, for the Eſcape of *Holt*, in Execution in the *Fleet*, in the Cuſtody of *Duckenfield*, Grantee for Life of the Office by the ſaid *Whitchott*, who was ſeiſed thereof in Fee: And upon a Special Verdict found before *Hale* Chief Juſtice at *Guildhall*, upon *nil debet*, the Caſe was thus: Sir *Jeremiah Whitchott* the Defendant, being ſeiſed in Fee of the Office of Warden of the *Fleet*, granted the ſame to *Duckenfield* for three Lives, at the Rent of 1000*l. per Annum*, and took Security by Obligation of 4000*l.* to ſave him harmleſs from Eſcapes. *Duckenfield* was admitted by the Common Pleas, and an Entry made of his Admiſſion, and that he made it appear to the Court that he was ſufficient. *Holt* and divers other Perſons being in Execution for great Debts under *Duckenfield*, and he it ſeems being a Perſon of deſperate Fortune, ſuffered all of them to eſcape, and went himſelf beyond Sea with one of them; now he not being reſponſible, whether Sir *Jeremiah Whitchcott* ſhould be charged with theſe Eſcapes, upon the Rule *reſpondeat ſuperior*, was argued this and ſeveral other Terms after by *Saunders*, *Levinz*, and others for the Plaintiff, and by *Holt* Junior, *Finch* and others for the Defendant.

And

And *Hale* upon the firſt Argument was clear of Opinion for the Plaintiff, and that the Action lies. The Objections made for the Defendant were, That at Common Law no Jailor was anſwerable for Eſcapes, but the Remedy that is in ſuch Caſe is given by Statute. The firſt Statute which gives a Remedy in this Caſe was *Weſtmin.* 2. *cap.* 11. which extends not to this Caſe, of an Execution for Debt, but only for Arrearages in Account, and *Whitchott* * is not ſuperior to *Duckenfield* in this Caſe, but *Duckenfield* during the three Lives, is as well Warden of the *Fleet* during that Time as *Whitchcott* is in Reverſion; and the Rule *reſpondeat ſuperior* does not extend to theſe Caſes, but to thoſe Caſes where the Officer makes a Deputy ſubject to his Controul, which *Duckenfield* was not in reſpect of *Whitchcott*, *Duckenfield* himſelf being Officer to that Court during his Time, *Co.* 2 *Inſt.* 382. 10 *E.* 2. *Fitz. Debt* 152, 192. *Noy* 69. *D. & Cha. de Paul's* Caſe, 16 *E.* 3. *Dam.* 81. *Fitz. Det* 148. 2 *Inſt.* 381. and divers other Books were cited. But for the Plaintiff it was ſaid and agreed, That Debt lay not at Common Law for an Eſcape, but Caſe lay as it lies at this Day for Eſcapes upon meſne Proceſs: And the Statute *Weſtm.* 2. though it mention Account only, extends to other Caſes by Conſtruction, notwithſtanding the Proviſion be there Special, as the Statute *de circumſpecte agatis de rebus tangent' Epiſcopum Norwicenſem*, by Conſtruction extends to all Biſhopricks. And after this Statute and before the Statute 1 *R.* 2. 12. which is the firſt Statute concerning Eſcapes, divers Actions of Debt were brought for Eſcapes in other Caſes beſides Account; as 16 *E.* 3. *Fitz. Dam.* 81. *Mich.* 41 *E.* 3. *pl.* 1. 41 *Aſſ. Bro. Eſcape* 28. which proves that Debt lay for Eſcapes upon this Statute in other Caſes than Account. And Statute 1 *R.* 2. 12. which gives an Action againſt the Warden of the *Fleet*, extends to all other Priſons and their Keepers. And this Statute of *Weſtm.* 2. which gives the Action upon Account, gives the Rule alſo *de reſpondeat ſuperior*; alſo Statute 2 *H.* 6. 10. is general, that all Officers of Courts put in ſuch Clerks for whom they will anſwer. And to the Ojection that *Duckenfield* is Officer, and therefore the Action lies not; it lies for this very Reaſon, for it lies not when the Gaoler makes a Deputy, becauſe the Act of his Deputy is his own Act, and he muſt be charged in that Caſe as for an Eſcape ſuffered by himſelf. But here he is

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charged for an Eſcape ſuffered by an Officer put in by him, upon the inſufficiency of that Officer. And no Action lies againſt the Deputy for an Eſcape, but againſt the Maſter; and the Statute provides, That if the Gaoler be not ſufficient, *reſpondeat ſuperior*, and a Deputy is not a Gaoler but a Servant to the Gaoler. And in the Dean and Chapter of *Paul*'s Caſe, the Reaſon why the Action lay not againſt the Dean and Chapter was, *Hale* ſaid, Not becauſe the Superior is not chargeable, but becauſe the Action ought not to charge * the Superior generally, but ſpecially, for Inſufficiency of the Bailiff of the Franchiſe they had put in, which was not alledged in that Caſe as it is here. And for Authority in Point were cited 39 *H.* 6. 32. the Duke of *Norfolk*'s Caſe, *& Rot. Parliam'* 12 *E.* 4. *Mem.* 5. where an Act of Parliament was made to excuſe the Duke from Eſcapes in the Time of *Brandon*, his Officer for Life, of the *Marſhalſea*; when the Soldiers of *H.* 6. broke open the Priſon Doors, and turned out all the Priſoners in the Time of the War betwixt him and *Edw.* 4. *Co.* 9 *Rep.* 98. *a.* Be the Gaoler Tenant for Life or Tenant at Will, ſo he be but Gaoler, the Superior muſt anſwer for the Inſufficiency of the Inferior, *Co.* 2 *Inſt.* 182. The Mayor, *&c.* of *London*, ſhall anſwer for the Inſufficiency of the Sheriffs, who have the Gaol, and *Co.* 4 *Inſt.* 114. the Lord of a Franchiſe ſhall anſwer for the Inſufficiency of the Bailiff put in by him, which is a full Anſwer to the Caſe in *Noy* 69. And though he appeared to the Court of Common Pleas upon his Admittance to be ſufficient, that is not material, they might be miſinformed: But *Whitchcott* at his Peril is to put in a Perſon ſufficient to anſwer for all Eſcapes, or otherwiſe he himſelf muſt anſwer. And afterwards Term *Paſch.* 29. after all the Arguments *Hale* being gone, and *Rainsford* Chief Juſtice, all the Court *preter Twyſden*, who ſeemed to heſitate a little, declared that the Action lay without doubt. But upon an Objection ſtarted by *Wylde* upon the Bench, That the Averment of Inſufficiency in *Duckenfield* is not well found by the Jury; for it is, that he was inſufficient at the Time of his Admittance, and when the Eſcape happened, which though it were, yet if he became ſufficient before the Action commenced, the Superior is not to be charged; whereupon Counſel was heard again, who argued that the Declaration ſhewing that

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tempore

tempore admiſſionis & adhuc he was inſufficient was good, and that the finding being in a Special Verdict, is well alſo, for it ſhall not be intended in a Special Verdict, that he became ſufficient after the Admittance and Eſcape, and before the Action brought. But afterwards *Trin.* 29. a new *Venire facias* was awarded by the Court for the Inſufficiency of the Verdict, and ſo no Judgment given in the Caſe. And ſome ſmall Time afterwards Sir *Jeremiah Whitchott* died before a new Trial could be had, whereby the Action abated.

Special Verdict finding the Officer ſufficient at the Time of his Admittance and Eſcape, and not at the Time of the Action brought, ill.

* *Horſy* againſt *Daniel.*

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JUDGMENT againſt Baron and Feme, Executors, *quod recuperent debitum de bonis* (omitting *teſtatoris*) and Damages *de bonis propriis* of the Huſband: And in Debt upon this Judgment, declaring of a *Devaſtavit*, it was reſolved, that though the firſt Judgment be ill, yet it is well enough to maintain this Action until it be reverſed; for no Advantage can be taken of the Error while it remains unreverſed. *Secondly*, it was reſolved, That this Action lies not, for though the Wife if ſhe ſurvive, is chargeable for the *Devaſtavit* of her Huſband, yet ſhe is not chargeable for the Coſts recovered againſt the Huſband *de bonis propriis*; and therefore upon Demurrer Judgment was for the Defendant.

Advantage cannot be taken of Error in a Judgment till it be reverſed.

Feme Executrix ſurvives, ſhe is chargeable for Damages recovered againſt the Huſband for his *Devaſtavit*, but not for the Coſts.

Harvy againſt *Gibbons.*

ERROR of a Judgment in *Shrewſbury* Court, where the Plaintiff declared, that he being Bailiff to *J. S.* the Defendant in Conſideration that he would diſcharge him of 20*l.* due to *J. S.* promiſed to expend 40*l.* in repairing a Barge of the Plaintiff's: Verdict and Judgment for the Plaintiff, upon *Non Aſſumpſit* was reverſed, the Conſideration being illegal, for the Plaintiff cannot diſcharge a Debt due to his Maſter.

Promiſe to a Servant, that if he will releaſe 20*l.* due to his Maſter, ill.

Tilly

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Tilly againſt *Collier.*

One having three Daughters, deviſed the Land to his Wife till his Heir come of Age, paying ſo much to his Heir, *&c.* and ſo much to the other Daughters, the eldeſt Daughter hath the Fee as Heir.

EJECTMENT, *Non Culp.* and a Special Verdict, whereupon the Caſe was, *Fermant* being ſeiſed in Fee of the Lands in Queſtion, and having three Daughters, *ſcilicet Suſan* eldeſt, *Anne* and *Elizabeth*, deviſed to his Wife all his Lands till his Heir come of the Age of twenty one, paying to his Heir 20*l. per Ann.* and to his other Children 20*s.* a-piece in the mean Time. *Item*, He gave to *Anne* and *Elizabeth* 140*l.* a-piece, and if *Suſan* his Heir die without Heirs before twenty-one, ſo that the Land fall to *Anne*, then *Anne* ſhall pay *Elizabeth* the Portion ſhe herſelf was to have; and if any of her younger Daughters die without Heir before twenty-one, her Portion to be divided between his Heir and the other Daughter. *Et per Curiam*, upon Argument: This is a Deviſe of the Inheritance to *Suſan*, and ſhe ſhall have the whole excluſive of her Siſters, by Reaſon of thoſe Words in the Will, which call her his Heir, and often mentioning his Heir in the ſingular Number throughout the Will; but by the Words, if *Suſan* his Heir die without Heir before twenty-one, ſo that the Lands fall to *Anne*, then *Anne* to pay *Elizabeth* the Portion which ſhe herſelf was to have, this is only an Eſtate-Tail, and not a Fee-ſimple.

And if *Suſan* my Heir die without Iſſue, to the other Daughter. *Suſan* is by this Tenant in Tail.

S. C. Lex Teſtament, 489, 490. 3 Keb. 589. Q. 2 Jo. 107. 2 Show. pl. 35. & pl. 28. 3 Lev. 70. Ante 58, 59. Mo. 422, 637, 853. 864. Cro. Car. 51, 57. 2 Cro. 415, 447, 448. Bridgm. 84. 3 Bulſt. 193. 1 Roll. Abr. 833, 836, 837. Cro. El. 525. 3 Wils. 244. Stra. 428, 1125. 1 Vez. 89. Gilb. Dev. 19. 1 Com. Dig. 27. 3 Atk. 617. Fearne Cont. Rem. 350. Cowp. 234, 410, 833, 835. Doug. 266, 340. 1 Burr. 228.

The Biſhop of *Carliſle*, &c. againſt *Wells.*

Spiritual Court may appoint Guardians to Infants, having only perſonal Eſtate. Vide poſt, 217.

DEBT by the Biſhop and his Commiſſary, upon an Obligation to them made, conditioned, That whereas the Defendant is appointed Guardian of an Infant by the Spiritual Court, if he ſafely guard the Infant and his Eſtate, and render him a juſt Account of all his Goods, Lands, *&c.* to be void. The Defendant pleaded that the Plaintiffs pretending a Power to take ſuch Obligation, took this *extorſive colore officii*, whereas they have no ſuch Power, and ſo the Obligation void;

Upon

Upon this the Plaintiff demurred, and *Weſton* argued for the Plaintiff, That the Ordinary * may appoint a Guardian to an Infant to take Care of his Perſon and Eſtate, and therefore great Reaſon he ſhould be allowed to take Security for Performance of the Truſt, both to himſelf who hath the Care of the Infant, and to his Commiſſary who is Judge of his Court; and cited *Swinburne* 102, 106. 2 *Rolle* 205. And this is not like the Caſe of the Biſhop of *Exeter* againſt *Starr*, where the Obligation was taken for Caution upon Excommunication, for that concerns the King. To which it was anſwered by *Levinz*, That if the Ordinary hath Power to appoint a Guardian or Curator to Infants that have only perſonal Eſtates, yet where the Infant hath Lands as here, he hath not as much Power. *Swinb.* 96, 97, 98. 2*dly*, If he hath Power to take ſuch Obligations, yet they ought to be taken to the King, *Bradſton*'s Caſe *Roll.* 1 *Rep.* as the Judges do in the King's Courts, who take all Recognizances to the King. 3*dly*, If the Biſhop may take Obligations they ought to be to him only, not to his Commiſſary, for if he ſhould ſurvive and afterwards die, the Obligation will go to his Executors. *Hale*, As to perſonal Eſtate, the Ordinary may appoint Curators, but cannot as to Lands, here are both: And if the Ordinary may take an Obligation to himſelf, it does not follow he may take it to him and his Commiſſary; and he ſeemed of Opinion the Obligation was not good. *Sed adjournatur*, and ſo hung till *Trin.* 29. when *Hale* being dead it was moved again, and the Court inclined that the Obligation was good.

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Biſhop takes an Obligation of a Curator or Guardian, in the Name of himſelf and his Commiſſary.

Welby againſt *Herbert.*

THE Plaintiff declared upon a Prohibition to a Suit in the Spiritual Court, that all Cuſtoms are triable at Common Law, and that the Defendant ſued him in the Spiritual Court, libelling, That all Farmers of ſuch a Farm have uſed to find Cakes and Ale at the Perambulation of the Pariſh, to the Value of 8*s. aut eo circiter*, and avers there is no ſuch Cuſtom, and that he ſo alledged in the Spiritual Court, but they refuſed the Plea; the Defendant pleaded that there is ſuch a Cuſtom, upon which the Plaintiff demurred: *Et per Curiam*,

Cuſtoms is never triable in the Spiritual Court, Cuſtom that all Farmers of ſuch a Farm uſe to find Cakes and Ale at Perambulations.

S. C. 3 Keb. 606, 609.

Ante 102, 103. Poſt, 187.

* P. 164
Cuſtom for Farmers is the ſame as Occupiers.
8 Jo. 204.

Curiam, Adjudged a Conſultation ſhall not go in this Caſe, for the Cuſtom in Farmers is no more than a * Preſcription in Occupiers, which is not good in Matters of Charge upon the Land, 6 *Co. Gateward's* Caſe: But as to the Objection of Incertainty in the Libel, in ſaying 8*s. aut eo circiter*, that is not material, for all their Proceedings are all ſo.

Maſters againſt *Wood.*

Traverſe *abſque hoc* que *aliter vel alio modo vel al autre lieu* Iſſue thereupon bad.
6. C. 3 Keb. 552, 612.
Vide ante 12, 142.
1 Lev. 32, 3 Lev. 40, 440, &c.

TRESPASS for Battery and falſe Impriſonment ſuch a Day and Place. The Defendant juſtified at another Day and Place, by Virtue of a Writ and Warrant from the Sheriff, *abſque hoc* that he is guilty *aliter vel alio modo, vel* at any other Place. The Plaintiff replied that he is guilty *aliter alio & modo*, and at another Place. Whereupon Iſſue was joined, and Verdict for the Plaintiff: But for the Badneſs and Incertainty of the Iſſue, upon Motion in Arreſt, Judgment was ſtayed, and a Repleader awarded.

Adderly againſt *Wiſe.*

Action laid in *London*, and Iſſue upon a Feoffment in *Oxfordſhire*, tried at *London*.
Vide 1 Mod. 37, 109.
2 Mod. 24.
2 Jo. 92.
Raym. 392, 398.
2 Danv. 455, 456.
6 Mod. 82.
Ante 122.

COVENANT, and declared, That the Defendant *Thomas Wiſe* conveyed to him the Manor of *Steeple-Burton in Com. Oxon.* and covenanted againſt himſelf, *William Wiſe* his Father, *Eldred* his Mother, and all claiming under them, and ſays, before the Defendant had any thing in the Land, *Wild* and *Darby* were ſeiſed, and conveyed the ſame to *Gerard Croker* in Fee, who conveyed to *William* and *Eldred*, the Father and Mother of the Defendant, and to the Heirs of the Mother; and that by their Death it deſcended to *Wm. Wiſe*, eldeſt Brother of the Defendant; and that he conveyed to *Rowny* and his Heirs; and that afterwards *William* the Brother conveyed to the Defendant and his Heirs, and ſo aſſigns for Breach, That the Defendant when he conveyed to the Plaintiff had no Title. The Defendant confeſſed the Seiſin of *Croker*, but ſayeth, That before the Feoffment to his Father and Mother,

Croker

Croker infeoffed *Crook* and *Brampſton*, and after entered upon them, and infeoffed his Father and Mother, and that *Crook* and *Brampſton* entered upon * them, and were ſeiſed *de priſtino ſtatu*, that his Father died and his Mother ſurvived, entered and diſſeiſed *Crook* and *Brampſton*, and died ſeiſed within five Years after, and the Tenements deſcended to his Brother *William*, and he infeoffed *Rowny*, and that *Crook* and *Brampſton* entered and infeoffed the Defendant whereby he was ſeiſed, and being ſo ſeiſed, conveyed to the Plaintiff, *prout*, &c. The Plaintiff maintained the Seiſin of *Croker*, and ſo made Title as he declared, *abſque hoc*, That *Croker* enfeoffed *Crook* and *Brampſton*, and ſo Iſſue joined upon the Feoffment. And this Action was tried in *London*, whereas the Action was local, ſuppoſing the Conveyance to the Plaintiff to be made there. And after Verdict this was moved in Arreſt of Judgment to be a miſtrial, for a Feoffment in *Oxfordſhire*, of Lands there, is local, and ought to be tried there. But *per Vaughan* Chief Juſtice & *Curiam*, reſolved this is cured by the Statute of *Jeofails*, 17 *Car.* 2. by the expreſs Words thereof, being tried in the County where the Action is brought, & *vide* 1 *Saund.* 246. *Trin.* 22 *Car.* 2. *B. R. Rot.* 902. *inter Croſt* and *Boil* in Caſe for Words at *London*, Juſtification at *Oxford*, Iſſue upon the Juſtification, and tried at *London*, where the Action was brought, and adjudged to be cured by this Act.

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6 Mod. 82, 1 Mod. 37, 199. 2 Mod. 24. 1 Lev. 207, 208. 2 Saund. 545, 246. 2 Jo. 92. 1 Sid. 326. 1 Vent. 22, 108. Raym. 392, 398. Ante 121, 122. 3 Keb. 350, 371, 309.

Bull againſt *Palmer*.

ASSUMPSIT, and declares that the Defendant covenanted with him, being Executor to *J. S.* as Executor, upon which Account ſo much was due, and he promiſed to pay it. Upon *Non Aſſumpſit* the Plaintiff was nonſuit, and the Queſtion was: If he ſhould pay Coſts? *Wylde* held he ſhould pay Coſts, becauſe he does not ſue as Executor, nor produce the Will, but founds the Action upon an Account with himſelf. *Rainsford* Chief Juſtice, *Twyſden* and *Jones* Juſtices *contra:* for the Action is in the Right of his Executorſhip, and the Money recovered will be the Aſſets; and they gave Judgment accordingly.

Executor upon Account with himſelf nonſuit, ſhall not pay Coſts. S. C. 2 Jo. 47. 3 Keb. 626, 643. Ante 161.

Coply

* P. 166

* *Copley* againſt *Dorkminicque.*

Statute of Limitations is no Plea to Debt by Aſſignee of Commiſſioners of Bankrupt. Plaintiff diſcontinues after Argument. S. C. 3 Keb. 625, 645. Q. 3 Lev. Vide poſt, 209.

ASSUMPSIT as Aſſignee of the Commiſſioners of Bankrupts, for a Debt due by Contract to the Bankrupt. The Defendant pleaded *Non Aſſumpſit infra ſex annos*, and the Plaintiff demurred. And *Weſton* argued, That the Statute of Limitations extends not to this Caſe, the Debt being aſſigned by virtue of an Act of Parliament, and ſaid it was ſo adjudged in 1653, whereupon a Day was given to ſhew that Record. But after for a Default in the Declaration, the Plaintiff had Leave of the Court to diſcontinue.

Strange againſt *Greenhil.*

Debt *ſur* Obligation of 50*l.* and the Obligation was *quantoginto libris.* S. C. 2 Jo. 48. 3 Keb. 644. Vide 2 Roll. Abr. 246, 147. Moor 864. 2 Bulſt. 241. 1 Lutw. 422. Nelſon's Lutw. 128.

DEBT and counts upon an Obligation of 50*l.* The Defendant demands *Oyer* of the Obligation, which was *Noverint, &c. me teneri in quantoginta libris*, and then demurs, and Judgment was given for the Defendant, for this Variance and Inſenſibility of the Word *quantoginta.*

Term.

Term. Sanct. Trin.

ANNO

28 Car. II. in Banco Regis.

Attorney General againſt *Matthews* in Chancery.

UPON a Decree made by the Commiſſioners of Charitable Uſes, being brought hither, and Exceptions taken thereunto, the Caſe was: *Henry Frier* ſeiſed in Fee 7 *Car.* 1. infeoffed ſeveral Perſons in Truſt, and by his Will appointed they ſhould pay 100*l. per Annum* to three Pariſhes in *London, ſcilicet A. B.* and *C.* for the Poor of thoſe Pariſhes; and likewiſe appointed ſome other Charities now determined, and of the Reſidue he declared they ſhould ſtand ſeiſed to the Uſe of the Poor in general for ever: After the Death of *Henry Frier*, Dr. *Frier* his Son and Heir whom he diſinherited upon ſome Diſpleaſure, conteſted this Settlement and Will in the Court of Wards, 8 *Car.* 1. and at laſt the Matter was referred to the King: Who by the Advice of the Archbiſhop of *Canterbury*, and the Lord Keeper *Coventry* awarded, That the Hundred Pounds *per Annum* ſhould be diſtributed to the three Pariſhes, *ſcil.* 20*l.* to *A.* and 40*l.* apiece to *B.* and *C.* and that 8*l. per Annum* for ever, ſhould go to the Rebuilding and Repair of the Church of St. *Paul's London:* The Reſidue to Dr. *Frier* and his Heirs; this Award was confirmed by ſeveral Orders in the Court of Wards, but no formal Decree was made, neither there nor in the Court of Chancery, where the King in his Award ordered it ſhould be ſettled by Decree alſo. And the Truſtees were to convey the Lands ſubject to theſe Uſes to Dr. *Frier*, and the Land * having ever ſince been enjoyed by him, and the Truſt performed, accordingly the Commiſſion-

General Charities are not within the Power of the Commiſſioners but of the King himſelf, and to be ſettled on Information in Chancery by the King.

* P. 168

miſſioners of Charitable Uſes upon complaint to them, made a Decree, whereby they ſettled the whole Eſtate to Charitable Uſes, without regard to former Proceedings, the King's Award, or the former Orders of the Court: And this Decree of the Commiſſioners was now quaſh'd by the Lord Keeper *Finch*, becauſe this being a general Charity, and for the Poor in general, the Commiſſioners have nothing to do with it, but it is to be determined by the King himſelf in this Court, upon an Information by the Attorney General in behalf of the King, which accordingly he directed to be brought. And now upon the Information the Lord Keeper ſaid, This general Charity belongs to the King himſelf to diſpoſe, but yet to the Poor. And therefore the Diſpoſal of 80*l. per Annum* to *Paul's*, was out of the Truſt, and void; and the Diſtribution to the three Pariſhes good, and to be confirmed. But as to the poor Kindred of *Frier*, who prayed to be conſidered, no Conſideration he ſaid could be had of them, for the Diſpoſition muſt be ſuch as may endure for ever, and they cannot live poor for ever. But before he would diſpoſe of the Reſidue, he ſaid he would acquaint the King with the Caſe, and the Value of the Eſtate, which appeared to be 400*l. per Annum* at leaſt, to have his Directions how the Diſpoſition of this general Charity ſhould be, and that to be confirmed by the Decree of this Court. And afterwards the King directed it ſhould go to the Maintenance of the Mathematical Scholars in *Chriſt's Hoſpital*, whom the King had lately appointed to be brought up there in order to be inſtructed in the Art of Navigation; which, *ut audivi*, was accordingly confirmed by the Decree of this Court. *Levinz* for the Defendant.

* P. 169

Browne againſt *Wayte*.

What Words in Acts of Parliament extend to make a Forfeiture of Eſtates-Tail. S. C. 2 Jo. 57. 2 Mod. 130. Poll. 181. Vide 1 Vent. 200.

EJECTMENT upon a Leaſe of the Manor of *Daventry*, upon the Demiſe of *John Danvers*, Son and Heir of Sir *John Danvers*: And upon *Non Culp.* a Special Verdict, wherein the Caſe was: Sir *John Danvers* upon a Settlement made before the 25th of *April* 1646, was ſeiſed in Tail the Remainder to his right Heirs. He after the Year 1646, levied a Fine to the ſame Uſes without Alteration, except only a Power to make

make Leaſes to raiſe Money for Payment of Debts and Portions; and 5 *April* 1655 died; and being one of thoſe Perſons who gave Judgment of Death againſt King *Charles* I. By the general Act of Pardon 12 *Car.* 2. it is provided, *That nothing in this Act ſhall extend to diſcharge the Lands, Goods or Chattels of Sir* John Danvers, and others therein named *from being forfeit.* And after by another Act of the ſame Parliament it is enacted, *That all the Manors, Meſſuages, Lands, Tenements, Poſſeſſions and Reverſions, Remainders, Rights, Intereſts, Hereditaments, Leaſes, Chattels real,* and other things of what *Nature ſoever,* that Sir *John Danvers,* or any other to his Uſe, or in Truſt for him, had 25 *March* 1646, or at any Time after, ſhall be forfeited to the King. Whereupon two Points were ſtarted. *Firſt,* Whether by this latter Statute this Eſtate-tail was forfeited to the King? Againſt which it was argued, that Eſtates-tail were never forfeitable for Treaſon before 26 *H.* 8. *c.* 13. and not then neither by the general Words of *Lands, Tenements and Hereditaments*; but by the particular Words of *any Eſtate of Inheritance whatſoever,* which included Tail-Eſtates. But this Statute extends to Caſes of Attainder only, and therefore will not reach this Caſe: for Sir *John* was never attainted; which ſhews alſo that the Parliament intended not to be ſo ſevere in the Caſe of Sir *John Danvers,* as it had been againſt other Perſons guilty of the ſame Crime, whom the Parliament attainted, though dead. And that Lands intailed were never forfeited by Acts of Parliament, which give the Forfeiture of Lands, Tenements and Hereditaments by general Words, * were cited Statute 25 *E.* 3. *de Treaſon,* which declares all Lands and Tenements to be forfeited to the King by Treaſon; 27 *E.* 3. 5. makes all Lands forfeited for drawing Men to Foreign Pleas; 15 *R.* 2. 5. makes all Lands and Tenements forfeit for bringing into this Realm Excommunications from *Rome*; 13 *R.* 2. for accepting Benefices out of the Realm; and the Statute of *Præmunire* makes a Forfeiture of all Lands, Tenements and Hereditaments; and yet none of theſe extend to Lands intailed, *Co. Litt.* 130. 11 *Co.* 63. *b. Trudgeon's* Caſe, *& Co. Litt.* 393. *b.* Intailed Lands were never forfeited by any Thing till Statute 26 *H.* 8. in Caſes of Attainder of Treaſon, and that not by the general Words *all Lands, Tenements and Hereditaments,* but theſe there following,

1 Salk. 269. 1 Hawk. P. C. 85.

1 Salk. 239.

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or

or *any Eſtate whatſoever*. 2d. Point, Whether by the Fine levied after the Treaſon committed (though it be to the old Uſes in Tail) and the Seiſin in Fee which he gained at the Inſtant of levying the Fine, this Forfeiture ſhall take Place as a Charge upon the Land precedent to the new Intail? Againſt which it was argued for the Plaintiff, That this inſtantaneous Seiſin was not forfeitable nor chargeable: For it is *revera*, no more than a fictitious Seiſin, not regarded in Law, *Co. Litt.* 31. A Wife is not endowable thereof, 2 *Cro.* 615. Tenant in Special Tail took a ſecond Wife, and made a Feoffment, ſhe is not endowable. But for the Defendant it was argued, That an Eſtate-tail is here forfeited by the Words of the Statute, *all Intereſts*, which are as comprehenſive, *as any Eſtate whatſoever*, in Stat. 26 *H.* 8. And the Intent of the Parliament could not be other than to give Eſtates-tail as forfeited, that the Penalty might be anſwerable to the Crime of the King's Murder. And in Stat. 12 *Car.* 2. where ſome of the Regicides are attainted, the ſame Words of Forfeiture, as here, are uſed; and all the Difference intended by them was only to ſpare Corruption of Blood in the one Caſe, and not in the other; but to make both liable as to the ſame Forfeitures: And it may be for any Thing appears to the contrary, Sir *John Danvers* had no Lands but what were entailed; and then there is no Penalty at all upon him, neither by Corruption of Blood or Forfeiture of Eſtate. To this Opinion ſome of the Judges ſeemed inclinable. But as to the other Point they held, That the Forfeiture could not attach upon the *inſtantaneous* Seiſin gained by the Fine. *Et adjournatur.* And

Inſtantaneous Seiſin not forfeitable by Treaſon.

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* afterwards in *Michaelmas* Term, the Judgment of the Court was delivered by *Rainsford* Chief Juſtice, That the Plaintiff ought to be barred upon the firſt Point. Upon which Judgment a Writ of Error was afterwards brought in 1690, in the Exchequer Chamber, and the Judgment affirmed: And afterwards 1691, Error thereupon was brought in the Houſe of Lords, and there again affirmed by a Majority of two or three Voices. *Levinz* for the Plaintiff, and Sir *John King* for the Defendant in the firſt Argument *in Banco Regis*.

Vide 1 Salk. 228.

Nota, This Judgment was afterwards 1 *W. & M.* affirmed in Parliament by one Voice only.

Attorney

Attorney General againſt Sir *Edward Farmen*, in the Exchequer Chamber.

INFORMATION by *Engliſh* Bill, for Lands derelict upon the Sea-coaſt, wherein the Caſe as drawn by Conſent of the Parties was: King *James* I. granted to *J. S.* certain particular *Marſh* Lands bordering upon the Sea. *Et ex uberiori gratia* granted, *omne ſolum, juncum, terram, arenam, terram mariſcal' contigue adjacen' præmiſſis, quæ modo inundat' vel aqua maris cooperta exiſtunt, & quæ ad aliquod tempus impoſterum recuperat forent per relictionem maris, vel aliter alio quocunque modo, Non obſtante non nominando valorem, quantitatem ſive qualitatem.* After this 100 Acres became derelict by the Sea adjoining to the Marſhes before particularly granted, and whether it belonged to the King or the Patentee? was the Queſtion. It was argued that the King ſhould have it. *Firſt*, Becauſe the King had not theſe 100 Acres ſince become derelict, and could not grant that which was not in him to grant. *Secondly*, This is to paſs a parcel of Lands which the King has by his Prerogative, which cannot paſs by general Words. *Thirdly*, If any Thing ſhall paſs it muſt be only ſo much as a Line borders upon the Parcels before granted; otherwiſe ſhould the Sea by Receſſion leave ten or twenty Miles of Sand, what muſt be the Boundary? Surely the Patentee is not to have all this extent of Soil. To this it was anſwered, That the King may grant that which is not actually in him at the Time of the Grant, as it is in *Dyer* 108. * *a.* 252. *b.* the Marriage of a Ward *quando acciderit*, and yet the King too hath the Ward in Right of Prerogative. 2. Here is as much Certainty as the Fact was capable of; no Number of Acres or Deſcription of the Soil, *quia non conſtat* what it would be, and to ſay that in that reſpect the Grant is not good, is to argue againſt the Prerogative, and to make the King in a worſe Condition than the Subject, *ſcil.* That he hath Lands, but cannot grant or diſpoſe of them. *3dly*, The *non obſtante* will make it good, if not good without it; for it is *Non obſtante non nominando valorem, qualitatem ſive quantitatem*, which implies all the Objections which are or can be againſt the Grant, 4 *Co.* 4. *b.* particular *non obſtante* in Letters Patents, cure all Defaults for want of Information

King granted derelict Lands, and all Lands *contigue adjacen'* which hereafter at any Time ſhould be recovered from the Sea: *Non obſtante non nominando valorem, quantitatem, ſive qualitatem*; Lands derelict after ſhall not paſs. Raym. 241, 242. 2 Mod. 106.

* P. 172

mation in the King; and here is a Particular of all Things whereof the King ought to be informed, but cannot by Reaſon of the Nature of the Thing. 4*thly*, The Words *contigue adjacen'* include all which in any Part adjoins, if not unknown; as one Cloſe is ſaid *contigue adjacens* to another, and yet in Fact it is not the whole Cloſe, but the Skirts of it that is *contigue adjacens* in a Line. *Sed poſtea*, *Montague* Chief Baron & *Curia*, with the Advice of the Chief Juſtices *Rainsford* and *North*, held, That nothing paſſed by theſe general Words; but the Patent as to the 100 Acres which became derelict after the Patent, was void. *Sawyer pro Rege*, *Levinz* for the Patentee.

Michael againſt *Aleſtree*, &c.

Caſe againſt the Maſter and Servant, for that the Servant brought a Coach into *Lincoln's-Inn-Fields*, with two ungovernable Horſes, to train them, which run over the Plaintiff, &c. S. C. 1 Vent. 295. 4 Keb. 650. Vide 1 Salk. 440, 441, 442. Bull. N. P. 25.

CASE, for that the Defendants in *Lincoln's-Inn-Fields*, a Place where People are always going to and fro about their Buſineſs, brought a Coach with two ungovernable Horſes, & *eux improvide incaute & abſque debita conſideratione ineptitudinis loci* there drove them to make them tractable and fit them for a Coach; and the Horſes becauſe of their Ferocity, being not to be managed, ran upon the Plaintiff, and hurt and grievouſly wounded him: The Maſter was abſent, yet the Action was brought againſt him as well as his Servant, and both found guilty. And now it was moved in Arreſt of Judgment, That no *Sciens* is here laid of the Horſes being unruly, nor any Negligence alledged, but *e contra*, That the Horſes were ungovernable: Yet Judgment was given for the Plaintiff, for it is alledged that it was *improvide & abſque debita* * *Conſideratione ineptitudinis loci*; and it ſhall be intended the Maſter ſent the Servant to train the Horſes there.

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Tracy againſt *Smith*.

Diſtribution equal between the Whole and Half Blood: S. C. 1 Vent. 307, 316, 323. 2 Jo. 93. 2 Vent. 317. 3 Keb. 669, 730, 776, 831.

PROHIBITION. One died, having Brothers *A. B.* and *C.* of the whole Blood, and *D. E.* and *F.* of the Half Blood. Adminiſtration was committed to *A.* and the Ordinary would bind him to diſtribute equally between thoſe of the Whole, and thoſe of the Half Blood: This was argued at Bar ſeveral Terms, and for the

the prohibition 'twas urged, That the Judges of the Common Law are to judge of Acts of Parliament, and Half Blood is not regarded at Common Law; the one cannot be heir to the other, nor can the Teſtator or Inteſtate be preſumed to have the ſame affection for the Half Blood, that he had for the Whole; and therefore unreaſonable the Ordinary ſhould give them equally a like Share of the Eſtate. Farther, the Statute is ſilent as to the Point, whether Half Blood be of Kin; it only appoints Diviſion ſhall be made between the Kindred of equal Degree; and therefore the Common Law is to determine who is of Kin, and what are the equal degrees of Kindred; but which were cited *Filz. Deviſe* 9. 2 *Roll.* 303. For the Conſultation 'twas argued, that the Statute being only for a Diſtribution of Things *Teſtamentary*, it muſt be conſtrued according to their Law. And a Brother of the Half Blood is a Brother, as well as a Brother of the whole Blood; and our Law takes Notice of this, and therefore allows that a Brother of the Half Blood may be a Guardian, as *Owen & 3 Cro. Swan* againſt *Gateland*. And this Statute is, That they ought to diſtribute according to the Law in Force, and our Law makes no mention of Diſtribution; therefore the Law in Force muſt be intended the Canon Law. And they cited alſo 2 *Roll.* 303. and *Style* 74, 75. And *Trin. Term.* 29 *Car.* 2. 'twas ſaid at Bar, That the Spiritual Court gave the Half Blood half Shares, which *Rainsford* and *Wylde* held reaſonable, *& poſtea Mich.* 29. a Conſultation was granted: *Quære tamen* whether generally or with an *ita quod* they gave but Half Shares to the Half Blood: For ever ſince their conſtant Courſe is to divide equally between the Whole and the Half Blood; and that has been approved ſince in the Courts of *Weſtminſter*.

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* Mayor, *&c.* of *London*, againſt *Gorry*.

Aſſumpſit for Scavage without expreſs Promiſe. S. C. 1 Vent. 298. 3 Keb. 480, 491, 677. Ante 142.

ASSUMPSIT for Money due by Cuſtom for Scavage: Upon *Non Aſſumpſit* the Jury found the Duty to be due, but that no Promiſe was expreſsly made: And whether *Aſſumpſit* lies for this Money thus due by Cuſtom, without expreſs Promiſe? was the queſtion: Reſolved it does, and Judgment for the Plaintiff. 1 Danv. 27, 7. 1 Show. 35.

Allen againſt *Reſcous*.

Aſſumpſit to beat one, naught. Vide 1 Cro. 113, 195, 245, 246. 11 Co. 53, 54. 2 Jo. 24.

ASSUMPSIT, in Conſideration that the Plaintiff would give him 20*s.* to give the Plaintiff 40*s.* if he did not beat *J. S.* out of ſuch a Cloſe; and that he gave the Defendant the 20*s.* but he did not beat *J. S.* out of the Cloſe. Verdict for the Plaintiff, but Judgment was ſtayed, for the Conſideration and the whole Contract is illegal and void.

Gold againſt *Cutler*.

Juſtifies the Impriſonment *per breve retorn' 15 Martini*: Plaintiff replies, and ſhews a writ *return' Octabis Martini*, and traverſes 15 *Martini*. Vide 1 Lev. 192. 1 Saund. 20, 22, 23.

DEBT upon an Obligation to the Sheriff, conditioned to appear *Octabis Martini ad reſpondend'*, *&c.* Defendant pleaded the Stat. 23 *H.* 6. and that he was taken and impriſoned *virtute Brevis retorn. quinden' Martini*, and that the Obligation was taken for Eaſe and Favour. The plaintiff replied, *auter briefe return. Octabis Martini*, and that he was taken and impriſoned upon that, *abſque hoc* that he was in priſon *virtute brevis return' quindena Martini*. The defendant demurred generally. And now *Saunders* argued the traverſe was ill and immaterial; for it matters not, whether any Writ was returnable *quindena Martini* or not: But he ſhould have

have concluded *et hoc paratus eſt verificare*; and left the Defendant to traverſe the Writ returnable *Octabis Martini*; and * upon this Traverſe no good Iſſue can be taken, for it is not material, whether any Writ was returnable *quindena Martini* or not; the only material Thing to maintain the Goodneſs of the Obligation is this, That the Writ was returnable *Octabis Martini*. *Sed per Curiam*, If the traverſe be immaterial, the defendant waiving that, ſhould have traverſed the Writ being returnable *Octabis Martini*. But they held the Traverſe was well enough in this Caſe, it being taken to be the moſt material Thing pleaded in Bar to avoid the Obligation; and they gave Judgment for the Plaintiff. *Vide Bennet* and *Filkin*'s Caſe, *Mich.* 18 *Car.* 2. *B. R. Sed intrat. Trin.* 18. *Rot.* 1172.

* P. 175

1 Lev. 194. 1 Saund. 20, 22. 2 Keb. 94, 105. Ante 114.

* Term. Sanct. Mich. * P. 176

ANNO

28 Car. II. in Banco Regis.

Dobſon againſt *Bell*.

TROVER for Goods ſuppoſed by the Declaration to be converted 20 *April*; and the Declaration was generally *de Termino Paſchæ*, and *Eaſter* Term this Year began 20 *April*. Whereupon after Verdict *pro Quer'*, this Matter was moved in Arreſt of Judgment: But on making it appear that the Bill was filed, and the Declaration alſo delivered, both after the 20th of *April*, the Judgment was entered for the Plaintiff,

Trover laid the firſt Day of *Eaſter* term, and the Declaration was of the ſame term. 8. C. 2 Jo. 87. 3 Keb. 693. For declarations in trover

vide 1 Danv. 24, 25. 2 Saund. 74. &c. 1 Lev. 18. 3 Lev. 370.

without any Amendment; for though the Declaration being general, relates to the firſt Day of the Term, yet the Bill being filed at a Day after, all relates to the filing of the Bill by the Courſe of the Court; of which Courſe if Error be brought, the Court where the Error is brought, will take Notice, as the Cuſtom of this Court. And a Precedent was produced, where it was ſo done. *Vide Trin.* 27. *ante*, *Hutchinſon* againſt *Thomas*; *& Trin.* 23. *Caſtle vel Tallow* againſt *Bateman.*

Hicks againſt *Pendarvis.*

Trover *de ampullis, nec ſays not how many & de parcella lintea.*

TROVER *inter alia de ampullis Anglice* Bottles, without ſhewing what Number, *& de quadam parcella lintea:* After Verdict and intire Damages, Judgment was ſtayed for the Incertainty.

Vide 1 Sid. 93. 273. 3 Keb. 253, 507. 1 Vent. 106. Style 482, 445. Ante 11. 1 Lev. 18. 301. 1 Com. Dig. 223. 5 Com. Dig. 32. 5 Bac. Abr. 274.

* P. 177

* *More* againſt *Finch.*

Sheriff's bond to appear *coram Majeſtate ſua apud Weſtmonaſterium*; and to anſwer a bill of 100*l.* not ſaying whoſe bill. Vid. poſt. 180. Ante. 123. 2 Show. pl. 38.

DEBT upon Obligation, conditioned to appear *before his Majeſty at* Weſtminſter, *Wedneſday next after three Weeks of* Eaſter, *to anſwer* Sarah Aſly *of a Plea of Treſpaſs, and alſo of a Bill to be exhibited againſt him for* 100*l.* The Defendant pleaded the *Statute* of *H.* 6. and ſhewed that the Writ was to appear *coram Domino Rege apud* Weſtmonaſterium *ad reſpondend'* Sarah Aſly *de placito Tranſgreſſionis, ac etiam billæ verſus ipſum exhibend' pro centum libris.* The Plaintiff demurred, and upon Argument the Court was of Opinion againſt him: 1. For that the Condition of the Obligation was to appear *coram Majeſtate ſua apud Weſtmonaſterium*, whereas it ought to be *coram Domino Rege.* 2. Becauſe it is not expreſſed in the Condition at *whoſe Bill* he is to anſwer, and it ought to be a Bill *ipſius Saræ exhibend'*; as it is, it does not appear to whoſe Bill of 100*l.* he is to anſwer.

Dunwell

Dunwell and Wife againſt *Bullock.*

TROVER inter alia de uno ferramento, Anglice, an Iron Range. Verdict for the Plaintiff and intire Damages; and it was moved in Arreſt of Judgment, that *Ferramentum* is a Word too general; for it ſignifies *any Iron Tool whatſoever. Sty.* 313, 327. *Trover de quodam inſtrumento ferreo, vocat' a Pair of Fetters,* or a *Horſe-lock,* or a *Brand-Iron,* naught. And there is a proper Term in *Latin* for a *Range*; for if ſo be he means the *Grate, Cratis* is *Latin* for it; if the *Broach* or *Rock* upon which the Spit turns, *Crateuta* or *Crateutorium* is *Latin* for it; and Judgment was ſtaid.

Trover *de Ferramento, Anglice a Range,* naught. 1 Vent. 304 Vide pag. precedent,

* *Hore* againſt the Earl of *Dorſet.*

* P. 178

DEBT againſt him as Heir to his Father upon an Obligation. He pleaded *riens per Diſcent præter* the Reverſion of certain Lands in *Herefordſhire* and *Worceſterſhire,* expectant upon the Life of *A.* and Judgment thereupon againſt him upon his Confeſſion of Aſſets. *A.* died, and now in a *Scire Facias* againſt him upon this Judgment, he pleaded, that *B.* was ſeiſed of thoſe Lands, until *C.* diſſeiſed him and infeoffed his Father, who demiſed to *A.* for Life: After whoſe Death *B.* entered and ouſted him; and iſſue being that *B. did not enter,* it was tried by a Jury of *Herefordſhire,* and Verdict for the Plaintiff. Upon which it was moved in arreſt of Judgment that this was a Mis-trial, for it ſhould have been tried by both Counties by ſeveral *Venire*'s; for which Judgment was ſtaid at Preſent.

Iſſue in two Counties tried in one.

Note 1. This ſeems cured by Stat. 21 *Jac.* which ſays *where the Venue is of one Place where it ought to be of more*; and does not reſtrain it to one County, ſo that it may well extend where the Places are in ſeveral Counties, according to the opinion of *Hale* in *Jennings* and *Hawkins*'s Caſe, *ante* 26 & 27 *Car.* 2. 2. This is in Debt againſt the *Heir,* wherein Damages, which are *ſeveral,* are

are not to be recovered, but the debt itſelf, which is *intire*; and if his plea be falſified in any part, the whole Debt muſt be recovered; and his Plea is falſified here by a Jury of *Herefordſhire*, where Part of the Lands lie, who are proper Jurors as to that Part. *Quære.*

Underwood againſt *Saunders.*

Preſcription for him & *quibuſd' aliis tenentibus de Manerio* Irtlingborough. 1. Quibuſd' incertain. 2 Ne nom. le manor.

CASE, and declares that he was ſeiſed of ſuch Lands, and that he and all thoſe whoſe Eſtate he had, *ſimul cum quibuſdam aliis tenentibus tent' per Copiam Curiæ de Manerio in Irtlingborough*, Time out of Mind, *&c.* have had *ſolam paſturam* in ſuch a Cloſe, from ſuch a Time until ſuch a Time; and the Defendant diſturbed him. The Defendant demurred generally upon the Declaration, and took theſe Exceptions. 1. That *cum quibuſdam aliis tenentibus* is uncertain, both as to what Kind, and what Number of Tenants. 2. *De Manerio in* * *Irtlingborough* is alſo uncertain what Manor: For ſeveral Manors may be in one Vill, and every Manor hath a particular Name: For which Reaſons the Court held the Declaration ill, and gave Judgment for the Defendant. *Levinz* Counſel for the Defendant.

* P. 179

The King againſt *Moore.*

Information in B. R. upon the ſtatute of *Ph. & Mar.* or taking a woman out of the cuſtody of her guardian. S. C. 3 Keb. 708, 715.

INFORMATION for that the Defendant and others, *exiſtentes* above the age of 14 *ceperunt*, one *A.* then being a Virgin unmarried, poſſeſſed *de bonis movilibus*, and ſeiſed of Lands of great value, out of the Cuſtody of her Mother, *contra formam Statuti.* After Verdict for the King it was moved in Arreſt of Judgment; 1. That it is ſaid the Defendants were above the Age of 14. at the Time of the Caption; for *exiſtens* or *being* refers to the Time of the Information, not of the Caption, as in the Caſes of *Forcible Entry, exiſtens liberum tenementum* refers to the Time of the Indictment, not to the Time of the Entry. *Sed non allocatur:* In theſe Caſes the *exiſtent'*

iſtent' follows the Verb *ipſum diſſeiſivit* of ſuch and ſuch Land *exiſtent' liberum tenementum*; and ſo may be his freehold after the Diſſeiſin: But here the *exiſtens* precedes the Verb *ceperunt*, and ſo it is tied up, and muſt relate to the time of the caption. 2. The Information is poſſeſſed *de rebus movilibus*, and it ought to be *mobilibus*, for there is no ſuch Word as *movilibus*: *Sed non allocatur*: The Seiſin of the Lands is ſufficient without the Goods. 3. This Information lies not in this Court; for the Statute of *Philip* and *Mary* directs the Puniſhment to be in the *Star-Chamber*, or before *Juſtices of Aſſize* by Fine and Impriſonment; therefore it lies not in this Court upon the Statute; and it cannot be maintained as an Offence at Common Law, becauſe of the Concluſion *contra formam Statuti*: *Sed non allocatur*: For though the *Statute* appoints the Examination in the *Star-Chamber*, *&c.* yet there are no *Negative Words*, and therefore this Court is not excluded. Hereupon they gave Judgment for the King, and fined the Defendant 500*l.* and committed him till he paid it: And thus the Doubt in *Mary Smith*'s Caſe 1 *Cro.* reſolved.

* *Kirbride* againſt *Dyke*. * P. 180

DEBT upon an Obligation of 2000*l.* to the Sheriff of *Cumberland*, conditioned to appear before his Majeſty's Juſtices of the King's Bench at *Weſtminſter die Mercurii poſt tres Septimanas Sancti Michael' ad reſpondend'* Annæ Curwen *viduæ in placito tranſgreſſionis, ac etiam billæ ipſius* Annæ againſt the Defendant *pro mille libris*. The Defendant pleaded the Statute of *H.* 6. and ſhewed the Writ was to appear *Domino Rege apud Weſtmonaſterium, &c.* and that the obligation was given for Eaſe and Favour. The Plaintiff demurred, and now it was argued for the Defendant, that the Obligation was void; not being made according to the *Writ*, which is to appear *coram Domino Rege*, whereas the Obligation is to appear *coram Juſticiariis Domini Regis de Banco Regis*. To which it was anſwered, that the Statute was made only to prevent extortion and Oppreſſion by the Sheriff, and not to tie the Sheriff up to Strictneſs

Writ is to appear *coram Dom' Rege* at *Weſtminſter*; Condition of the Sheriff's Bond to appear before his Majeſty's Juſtices of the King's Bench at *Weſtminſter*, good. Vide ante, 123, 177. 2 Show. pl. 38.

Strictneſs of Forms, ſo long as the Thing be ſatisfied in Subſtance; and that Words in *Deeds* or *Obligations* are to be taken according to common Parlance, as in *Cro.* a Submiſſion to an Award, ſo that it be made before the firſt Day of the Term, and the Award was made after the *Eſſoin*, but before the *quarto die poſt*, and good; for in vulgar Acceptance the *quarto die poſt* is the firſt Day of the Term: So here, *coram Dom' Reg' apud Weſtmon'* is in common Parlance before *his Majeſty's Juſtices of the King's Bench at* Weſtminſter; and all one. And if the Party had pleaded *comparuit ad diem coram Domino Rege apud Weſtmon' ſecund' exigen' brevis*, it had been ſufficient. And 2 *Cro.* 286. *Villiers* Sheriff of *Leiceſter* againſt *Haſtings*, Niceties are not to be favoured in Sheriffs Bonds ſo long as they contain ſuch Certainty that the Defendant may know where to appear: Upon the View of which Caſe of *Cro.* the Court was of opinion and gave Judgment for the Plaintiff: But the Matter being formerly moved in *Hale's* Time, and he then doubting, the Defendant brought a Writ of Error in the *Exchequer-Chamber*, where *Hill.* 28 and 29 it was argued again, * and moſt part of the Judges were for affirming the Judgment. But *North* Chief Juſtice *de Com. Banc.* being ſtrongly againſt it, the Caſe was thereupon adjourned till *Paſch. proxi'*. *Levinz* for the Plaintiff in the Action.

* P. 181

Bull againſt *Knight.*

Smith's Forge to pay Chimney-money, not a Blowing-houſe.

TRESPASS for taking his Goods, and upon *Non Culp.* the Jury found a ſpecial Verdict, and therein the Statute of Chimney-Money, which does enact, That for every *Fire-hearth* ſhall be paid 2*s. per Annum*, *Proviſo*, That the Act ſhall not extend to any *Blowing-houſe*, *Stamp* or *Kiln*. And that the Plaintiff had a *Smith's Forge*, which cannot be uſed without Bellows to blow the Fire; and becauſe the Plaintiff would not pay 2*s.* for it, the Defendant Collector of the *Chimney-money*, took the Goods as a Diſtreſs for the 2*s.* *& ſi, &c.* And upon Argument by the King's Counſel

ſel for the Defendant, no one appearing for the Plaintiff, judgment was given for the Defendant, for a *Blowing-houſe* is a Houſe where Iron, Lead, or Tin is caſt or melted, to which the *Proviſo* extends, but not to a Smith's Forge.

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* Term. Sanct. Hill.

* P. 182

ANNO

28 & 29 Car. II. in Banco Regis.

Abram againſt *Cunningham*

EJECTMENT; wherein upon *Non Culp.* and a ſpecial Verdict, the Caſe was: *David Cunningham* being poſſeſſed of an *Intereſſe Termini* for 30 Years to commence in 1671, made his Will; and made another *David Cunningham* his Executor, and died in 1659. *David* the Executor, 8 *October*, 1661, made his Will, and *Ninian Cunningham* and *Andrew Hays* his Executors, and 15 *September*, 1665, died, having proved the Will of the firſt *David*. The Ordinaty not having notice of the *laſt* Will 14 *Feb.* 1665, granted Adminiſtration *de bonis non* of the firſt *David*, *non adminiſtratis* by the ſecond *David* to *Bradborne* a Creditor of the firſt *David*, no Probat being made of the Will of the ſecond *David*. 21 *Octob.* 1671. *Hays* the ſurviving Executor renounced the Will of the ſecond *David* before the Ordinary, whereby the firſt *David* died inteſtate. 1 *March*, 1672. *Bradborne*

Ordinary grants Adminiſtration where there is a Will and Executors, but concealed, it is void, and not made good by the Executor's Renunciation afterwards. S. C. 1 Vent. 303. Vide 1 Salk. 41, 301. 1 Mod. 214. 2 Jon. 72. 2 Mod. 146, 147. 3 Keb. 725. Ante. 55, 90. 1 H. 6. 13.

Bradborne for 1000*l.* aſſigned the Term to *Lovelace*. 11 *Feb.* 1673. *Bradborne* was ſued by Citation to repeal the Adminiſtration committed to him, and the 13th of *February*, 1673, the Adminiſtration was repealed and committed to *Cunningham* the Defendant, who entered; upon whom *Lovelace* re-entered, and made the Leaſe to the Plaintiff, whereupon the Action is brought. And whether the Plaintiff or Defendant hath the better Title? was the Queſtion, which was argued by *Saunders* for the Plaintiff; and two things were admitted by him; 1. That where an Executor is *in* * *Eſſe*, who after proves the Will, Adminiſtration granted in the mean time, without Notice of the Will, and all mean Acts done by ſuch an Adminiſtrator are void, according to *Greysbrook* and *Fox*'s Caſe, *Flowd. Com.* 2. Where Adminiſtration is granted to one who diſpoſes of Goods, and his Adminiſtration is repealed afterwards by Citation, as here; all mean Acts done by him are good, as *Packman*'s Caſe, 6 *Co.* But thirdly, he ſaid this is a *middle Caſe*, for here is an Executor *in Eſſe* and a Will at the time of Adminiſtration granted. But the Executor renouncing afterwards, eſpecially before the grant to *Lovelace*, hath made that good *ab initio*, and conſequently the Sale of the Term alſo; although the Adminiſtration be afterwards repealed upon the Citation. *Levinz* anſwered, that the Grant of Adminiſtration, there being an Executor *in Eſſe*, was utterly void, and not voidable, and ſo could not be made good by the Renunciation, and this for two Cauſes: 1. Where there is a Will and Executor *in Eſſe*, the Ordinary hath no Power to commit Adminiſtration, but as he is enabled by the Statutes of the Realm, 9 *Co. Henſloe*'s Caſe. Now the Statute of the 31 *Ed.* 3. 11. is, that where a man dies inteſtate, the Ordinary ſhall commit Adminiſtration to his next Friends. The Ordinary then hath no Power by this Statute till the Party dies inteſtate, which was not in this Caſe till the Executor had refuſed. And the Statute of 21 *H.* 8. 5. is more plain; for that is *in caſe any Perſon die inteſtate, or the Executors refuſe, then the Ordinary ſhall commit Adminiſtration.* When then ſhall he commit? When the Executor refuſes. By the death of the Teſtator the Executor

* P. 183

Ow. 44. Cro. El. 92, 858. Mo. 272. 373. 1 Leon. 135, 154 5 Co. 28. 1 Sal. 3 1 Bl. Rep. 456. 3 Bur. 1465. 1 Vent. 303, 335.

cutor hath immediately the property of the Goods in him, and may either grant or releaſe before *Probate*, though he cannot maintain an Action, 5 *Co. Middleton's* Caſe. How then can the Ordinary veſt the Property in another by granting him Adminiſtration? For there cannot be two ſeveral Properties in ſeveral Perſons in the ſame Thing. Suppoſe the Executor ſell to one, and the Adminiſtrator to another, and afterwards the Executor refuſe, which of the two Vendees ſhould have the Goods ſold? Doubtleſs the Vendee of the Executor. 3dly, if the Adminiſtration was void *ab initio*, no ſubſequent Matter could make it good; for Things voidable may be made good by Matters ſubſequent, but things void cannot; *Co. Litt.* 215. *a.* 3 *Co.* 64. *b. Dyer*, 339, 240 1 *Co.* 62. Biſhop makes a Leaſe for four * Lives, one of which determines in the Life of the Biſhop, yet the Leaſe is not made good as to the Succeſſor. The Court were ſtrongly of Opinion for the Defendant, that the adminiſtration was void at firſt, and was not made good by the Renunciation of the Executor; and therefore the Sale by the Adminiſtrator, though made after the Renunciation was void, and gave Rule for Judgment for the Defendant, *niſi cauſa* before the end of this Term. But after upon the Importunity of *Pemberton* to be heard to this Point the next Term they gave him Leave accordingly. But he not arguing it next Term, the Rule was made abſolute, and Judgment given for the Defendant.

* P. 184

Hippſly againſt *Tucke.*

ERROR of a Judgment in *Newberry* Court; and it was aſſigned, that the *Mayor* who was Judge there had not taken the Oath and Sacrament according to Stat. 25 *Car.* 2. for which his Office was void before the Judgment given, and ſo the Matter *coram non Judice*. To which it was anſwered, that this is not Matter aſſignable, being contrary to the Record, whereby he is taken and admitted to be Judge, 2 *Cro.* 359. 3 *Cro.* 320. Alſo though the Statute make the Office

Judge of an inferior court has not taken the oath, &c. according to Stat. 25 *Car.* 2. &c. yet his Judgment is not void, and cannot be aſſigned for Error.

S. C. 2 Jon. Poſt. 242.

81. 3 Keb. 606, 665, 682, 721. 3 Blac. Abr. 471.

void,

void, yet that is only *quoad* himſelf, to ſubject him to a Fine for meddling in the Office; not *quoad* Strangers, who may not know whether he had taken the Oaths or not, to make his Judgments void to their Prejudice: Farther it was ſaid, that he is *de facto* a Judge, which is ſufficient; as if a Steward *de facto* admits a Copyholder, the Admiſſion is good, though he was not *de jure* Steward. But to this it was replied, that the Statute in making the Office *void* makes it *void* to all purpoſes touching the Juriſdiction, and then this Matter is aſſignable, though contrary to the Record. 2 *Roll.* 761. Of which Opinion was the Court now, and reverſed the Judgment. But afterward *Hill.* 30 & 31 *Car.* 2. *inter Denning* and *Jennings*, which is entered *Paſch.* 30 *Car.* 2. *B. R. Rot.* 391. it was adjudged *contra.*

* P. 185

**Aſtry* againſt *Ballard.*

By a Leaſe of Land and Mines, wherein ſome are open and ſome not, thoſe open paſs only. S. C. 2 Jon. 71. 3 Keb. 709, 723, 761, 765. &c. Vide Plowd. Caſe of Mines.

TROVER, upon *Non Culp.* and a ſpecial Verdict, the Caſe was, One ſeiſed of Land wherein were ſome Mines open, and ſome not open, by Indenture demiſed the *Lands* and *Mines* therein to the Defendant, who opened a new *Coal Mine*, not open before, and there dug the Coals for which the Action is brought; and whether in this Caſe by the Demiſe *Lands and Mines* he could open new *Mines*, or not? was the Queſtion. For the Plaintiff it was ſaid, that he could not, and *Co. Lit.* 54. *b.* cited: A Leaſe of *Lands* and *Mines*, ſome open, and ſome not; thoſe only which are open paſs, being ſufficient to ſatisfy the Words, and the Leſſee cannot open *new Mines*: So if a Man demiſe Land and *Timber*, the Leſſee is not impowered to fell Timber. 11 *Co. Liford's Caſe.* By ſuch general Words Leſſees ſhall not have power to commit Waſte; where it is intended to inveſt him with ſuch Power, there ought to be expreſs Words in the Grant to that purpoſe, as in this Caſe, *Mines open or not open:* For the Defendant it was anſwered and agreed, that *Co. Lit.* 54 *b.* is, as was cited; but to warrant his Opinion he cites *Saunders's Caſe*, 5 *Co.* which does not warrant it; for there

there it is expreſsly ſaid, that by a Leaſe of Land *Mines open* will paſs, not that by a Leaſe of *Land and Mines, Mines not open* will not paſs; and if by a Leaſe of Land only *Mines open* paſs, and by a Leaſe of *Land* and *Mines Mines not open* do not paſs, the Word *Mines* will ſignify nothing in the Caſe; for by a Leaſe of *Land and Mines* nothing but the Laud *Mines open* paſs, and ſo they would by a Leaſe of the Lands only: This then is only the Opinion of *Coke* in his Comment upon *Littleton*, not warranted by *Saunders's Caſe*, nor any other; for all the former Books ſay, that by a Leaſe of *Land* and *Mines* the *Mines* paſs, not making any diſtinction, whether open or not open. But the Court held, that by the Words *Land* and *Mines*, there being *Mines open* at the time of the Demiſe, no *Mines* paſs but thoſe open, and gave Judgment for the Plaintiff. *Simpſon* and *Pemberton* for the Plaintiff; *Levinz* for the Defendant.

**Wiſe* againſt *Creeke.*

* P. 186

Repair of the Pariſh Chapel ſufficient to exempt from Repair of the Pariſh Church. 3 Keb. 727, 791, 809. Ante 102, 163. Vide 3 Keb. 729, 802, 819, 829. 1 Jo. 89. 2 Mod. 222. 1 Mod. 236.

A *PROHIBITION* was prayed this Term to ſtay a Suit in the Spiritual Court by the *Churchwardens* of *Adderbury in Com. Oxon.* againſt the Inhabitants of *Bodecut*, a Village within the Pariſh of *Adderbury*, for Repair of the Pariſh Church; *Suggeſting*, that they have a Chapel Parochial and Rights Parochial, and *ratione inde* have time out of mind been diſcharged from repairing the Pariſh-Church. The Court granted a *Prohibition*, but ordered the Plaintiff to declare thereupon, that the Matter might come judicially in Debate, whether ſuch Cuſtom be good or not? Accordingly the Plaintiff declared, that time out of mind they have had in *Bodecut* a Chapel Parochial, or Church of *Bodecut infra Parochiam de Adderbury*; in which time out of mind there has been a Body of a Church, a Chancel, *Campana & omnia alia parochialia trophæa*, and divine Service and Sacraments, and a diſtinct Perambulation for *Bodecut*, ſeparate from that of *Adderbury*, and that the Inhabitants of *Bodecut* never go to the Church of *Adderbury*

Adderbury, nor have Seats there, and that the Inhabitants of *Bodecut* have diſtinct Churchwardens, and make no other Uſe of the Church or Church-yard of *Adderbury*, *niſi tantum pro ſepultura*; and that time out of mind they have repaired their Parochial Chapel or Church of *Bodecut*, and the Inhabitants of *Adderbury* have been freed and exempt from this Charge, and *ratione inde* time out of mind they have been freed and diſcharged from repairing the Church of *Adderbury*, and yet the Defendants libel againſt them to repair the Church of *Adderbury*. Upon this the Defendant demurred, and for the Plaintiff it was ſaid, that a general Preſcription without Cauſe to exempt from Repair of the Pariſh Church is not good, for every Pariſhioner is liable thereto of common right. 2. The Cauſe here; *ſcil.* the Repair of their own Parochial Chapel is not a ſufficient Cauſe of Diſcharge; for it is for their own Eaſe, and therefore cannot diſcharge them from a Duty to which they are liable of common Right: But if they had preſcribed to be diſcharged upon paying ſo much towards the Repair of the Pariſh Church, or the Walls of the Church-Yard, that might be good, as 2 *Rolle*. 290. *Hob*. 166. Thirdly, this Cuſtom, if there be ſuch a Cuſtom, might have been pleaded * in the Spiritual Court, and there tried, being Matter Eccleſiaſtical, and triable there by the expreſs words of the Statute *de circumſpecte agatis, ſcil. de Eccleſia diſcooperta vel Cemiterio non clauſo non jacet prohibitio:* But for the Defendant it was anſwered; firſt, 'Tis true a general Preſcription to be diſcharged from the Repair of the Pariſh Church is not good without ſome reaſonable Cauſe, no more than a general Preſcription of Diſcharge from Repair of the Highway, *quia bonum publicum*. But 2. Here is a good Cauſe of Diſcharge for want of Seats in the Parochial Church and not going there *niſi ad ſepeliend'*, and this might have a reaſonable Commencement: For inſtance, the Mother-Church might become too ſmall for the People, and the People too numerous for the Mother-Church by the increaſe of new Buildings and Inhabitants in the Village; and it might be agreed, that the Inhabitants of the Village ſhould build them a Chapel, and no longer overthrow the Mother-Church; but ſhould repair and find Seats,

* P. 187

Bells,

Bells, &c. in their own proper Chapel: And this hath been allowed a good Conſideration of being exempt from the Repair of the Mother-Church; as in 2 *Rolle* 219. the ſame Caſe before cited on the other Side, and *Hob.* 67. Where it appears the Conſultation in the Caſe of *Chapel-Bromwich* was not granted becauſe the Cuſtom was void, but becauſe the ſuggeſtion was falſe; and *Hob.* himſelf in the End of the Caſe ſays, if ſuch a Cuſtom had been alledged, a Prohibition had lain, and ſo it was reſolved in this Court *inter Palſry & Brown, Paſch.* 26 *Car.* 2. *B. R.* To the third Objection; it is true, the Repair of Churches is expreſsly within the Statute *de circumſpecte agatis*; but when a Cuſtom comes in Diſpute, the Cuſtom is temporal, and muſt be tried in the Temporal Courts, becauſe their Law and the Common Law differ in the very eſſence of Cuſtoms. So Tithes and a *Modus decimandi* are within the Words of the ſame Statute; *ſcil. Decimis, ſive conſuetis*, where *Decimis conſuetis eſt modus decimandi*; *Co.* 2 *Inſt.* 490. And for this Reaſon a *Modus decimandi* is ſuable there; but yet if the *Modus* be denied, or another *Modus* there pleaded, a Prohibition lies; 2 *Roll.* 293. *Het.* 138. 3 *Bulſt.* 241. and of this Opinion was the Court; *Mich.* 26. when this Caſe was argued upon the Prohibition, *ſcil.* that a Prohibition lay, and adviſed the Defendant's Counſel to take iſſue upon the Cuſtom; to which Purpoſe they gave him time to talk with his Client. *Holt jun.* for the Plaintiff, *Levinz* for the Defendant.

* *Hall* againſt *Huffam.* * P. 188

ASSUMPSIT for 100*l.* for Wares ſold by the Plaintiff, and one *Witty* whom the Plaintiff ſurvived. The Defendant pleaded in Abatement, that the Plaintiff and *Witty* were Joint-Merchants, and that *per legem mercatoriam* there is no Survivorſhip *inter Mercatores*, and that *Witty* made ſuch a one his Executor, who adminiſtered, and is ſtill alive, not Party to the Suit.

Surviving Joint-Merchant brings Action as Survivor; naught. 3 Keb. 737. 798. Ante 111. Poſt. 228.

2 Saun. 116, 117. 1 Vent. 167, 297. 2 Vent. 288, 291. 2 Leon. 14. 1 Bulſt. 16. Styl. 156, 203, 298. Hob. 198. 1 Lev. 15. 2 Lev. 27, 228. 3 Lev. 258, 351 354, 362. 1 Roll. Abr. 31. Z. 9, 12, 561. 1 Dav. 5, 6, 7. 2 Danv. 498. 3 Mod. 321. 1 Salk. 10. 2 Salk. 423, 436, 440, 444.

The

The Plaintiff demurred, and upon conſideration of *Co. Lit.* 172, 182. *F. N. B.* 172. e. it was reſolved by the whole Court, that the Action ſhould abate.

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* P. 189

* Termino Paſchæ,

ANNO

29 Car. II. in Banco Regis.

Norden againſt *Levit.*

Executor having an Action of Trover in right of the Teſtator compounds it by Articles for payment of ſo much at a future day, this is a converſion and aſſets in his hands before payment. 3 Keb. 59, 615, 691, 706, &c. Vid. 1 Danv. 241. pl. 20. Vide 6 Mod. 94. 56. 1 Saund. 307.

SCIRE Facias upon a Judgment againſt the Defendant is alledged, that he had waſted the Goods and diſpoſed and converted them to his own Uſe; and upon Iſſue *non devaſtavit, vendidit ſeu in uſum proprium convertit*, a ſpecial Verdict was found, that *A.* was liable to an Action of Trover to the Defendant for Goods of the Inteſtate; and that after an Action brought the Defendant and *A.* came to an Agreement by Articles, that the Defendant ſhould diſcharge *A.* and that *A.* ſhould pay him ſuch a Sum at a future Day not yet come, *& ſi &c.* And it was argued by *Eyre* for the Plaintiff, that the iſſue is found for the Plaintiff; for the Defendant by accepting a new ſecurity for payment of the Money to himſelf hath extinguiſhed the old Right; as

Vide ante 40, 110, 133. 1 Lev. 147, 245 255, *&c. ib.* 2 Show. 55. 2 Saund. 403.

if

if he had taken an Obligation for a Debt due by Contract, and therefore he hath made himſelf liable *ad valorem*, though he hath not received the Money; for the new ſecurity is *quaſi* a payment to him, *Yelv.* 10. It was anſwered by *Pollexſen*, that this cannot be a *Devaſtavit*, for here is no Hurt done by him; he hath only taken the beſt means that could be to ſecure the Eſtate; and this is not like the Caſe of an Obligation taken for a Sum due by ſimple Contract; for there is a Debt certain, but here only Damages were to be recovered, according to the diſcretion of the Jury, which are now aſcertained by the Articles, but are not Aſſets in his hands until the money received. *Curia*, This is not a * *Devaſtavit*. But by Sir *Thomas Jones Juſtice*, This is a diſpoſal and a converſion to his own uſe, by Reaſon of the new Security, whereby he had diſcharged the antient Right to the Goods, and ſo it is *quaſi* a ſale of them, and they are Aſſets preſently, though by his own Act the Money is not payable until a future Day. Some of the other Juſtices ſeemed to incline to this, & *adjournatur*; but afterwards next Term all the Judges agreed that it was a diſpoſition, and Judgment was given for the Plaintiff by the whole Court. * P. 190

Granwell againſt *Sibly*.

DEBT againſt the Defendant as *Executrix* of her Huſband; the Defendant *imparled*, and then pleads *Actio non*, becauſe her Huſband died inteſtate, and Adminiſtration was committed to her *abſque hoc* that ſhe is Executrix, or ever adminiſtered as *Executrix*; upon which the Plaintiff demurred. And it was ſaid for the Plaintiff, that his Plea is no more than *Miſnomer*, which goes only in Abatement, and therefore cannot be pleaded after general Imparlance, and it is not like the Plea *ne unques Executor*, which wholly eſtranges the Teſtator; for here ſhe admits herſelf liable to the Action, but in another Manner, *ſcil.* as Adminiſtratrix. To which it was anſwered for the Defendant, that though this Plea does not go to the *Right of the Action*, yet

Executor ſued imparles, and then pleads in Bar that he is adminiſtrator, and not Executor: This is only in abatement, and therefore naught after general Imparlance. Lex Teſtam. 407, 408. Vid. Sty. 385. Cro. El. 815. Poſt 197. Peer. Will. 43, 767. Cowp. 140. Cro. Jac. 258, 259

yet it goes to the *Action of the Writ*, as *Robiſon's Caſe*, 5 *Co.* and this will bar the Plaintiff ever to charge the Defendant as *Executrix*, and ſo it is more than a Plea in Abatement, though it be no bar to the Right itſelf, when the Plaintiff charges the Defendant as *Adminiſtratrix*. But *per Curiam*, This Plea is only in *Abatement*, and therefore cannot, as it is in this Caſe, be pleaded after general Imparlance; upon which they gave Judgment for the Plaintiff. *Simili Caſus & ſimile Judicium eodem tempore inter Howly & Sibly.* *Martin Stanhope* Attorney, and *Levinz* Counſel for the Plaintiff, *Saunders* Counſel for the Defendant.

* P. 191

* *Paget* againſt *Voſcius*.

Deviſe to a man during his exile. S. C. Show. M. 8. 1 Vent. 325. 2 Mod. 213. 1 Jon. 73. 3 Keb. 638, 749.

EJECTMENT upon *Non Culp.* was tried at Bar, and upon a ſpecial Verdict the Caſe was, *Brown* being ſeiſed of Lands deviſed them to *Voſcius* during his exile. *And if it ſhall pleaſe God to reſtore him to his Country, or if he die, then he deviſed them to the Leſſor of the Plaintiff.* *Voſcius* was a *Dutchman* and had a Penſion from the *States*, but upon ſome diſpleaſure the *States* deprived him of his Employment and of his Penſion, and gave them to another, whereupon he voluntarily left the Country, and came and lived here with *Brown*, who had been his Acquaintance beyond Sea. After his coming hither a War happened between the *Dutch* and the *Engliſh*, and afterwards a Peace was concluded between the two Nations, yet *Voſcius* ſtill continued here. And whether the Eſtate of *Voſcius* be determined, or continues? was the Queſtion. Argued this Term and *Trin. prox.* by *Holt Jun.* and *Maynard King's Serjeant* for the Defendant; and by *Jones Attorney General* and *Pemberton King's Serjeant* for the Plaintiff. And for the Plaintiff it was ſaid, 1. That exile is either by *Reſtraint*, as when the States of the Country forbid or make it penal for the Party to return, which is not in this Caſe: Or 2. *Voluntary*, where the Party leaves his Country upon Diſguſt, but may return again at his pleaſure. Now this ſecond cannot be the Exile *Brown* meant, becauſe of theſe

Exile *quid & quotuplex.*

these Words, *if it shall please God* Voscius *be restored*; and therefore the Exile *Brown* intended was not such as depended upon the pleasure of *Voscius*; but he meant, that when he could return to his Country with safety, which could not be done (during the War) his Estate should determine; and though the War was not the Cause why he left his Country, yet it was the Cause why he could not return; and now when he may return, and does not return, *equum est* as if he had returned; so is the 15 *H.* 7. 1. Annuity granted until he be promoted, offer of Promotion and refusal shall determine the *Annuity*. On the other side, those for the Defendant agreed the Distinction of *Exile voluntary*, or *coercive*; *Calvin's Dictionary*, *verbo Exilium*. *Plutarch* in the Life of *Marius* * says, that he went into voluntary Exile. One who abandons his Country upon its displeasure at him is in Exile: Here *Voscius*'s Pension and Office were taken from him by the States, and given to another; and in our Law it is Exile *in hominibus* to impoverish the Tenants; here *Voscius* is impoverished by taking away his Pension. 2. The War does not concern him: He came here before the War, and he might have returned before the War. 3. If there be no Exile in the Case, then is the Estate of *Voscius* an absolute Estate for Life, for the Exile is not a Condition precedent, but subsequent; which was denied by *Jones Attorney General*, for the Estate is devised to him during his Exile, and if he be not in Exile *omnino*, he hath no Estate *omnino*; for this is not like the Case of a Feoffment and Condition subsequent; there the Estate passes before, here it is by a Devise during his Exile, so that Exile is in the Devise itself, and if no Exile no Devise. *Twysden Justice*, If a voluntary Exile will serve the turn, then hath *Voscius* an Estate for Life if he pleases, which does not seem to be the Devisor's intent. *Jones Justice*, These Words, *if it please God to restore him*, seem to signify and refer to something else than only the Will of *Voscius*. *Rainsford Chief Justice*, *Brown* takes notice of the difference and of the War between the *Dutch* and *English*, and of the displeasure of the *States* to *Voscius*, and their taking away his Pension; and these seem to be the Exile intended by him: *Adjournatur*; and after *Hill.* 29, 30. Judgment was briefly delivered by *Rainsford*

* P. 192

A man relinquishes his country for the displeasure of the States against him.

ſord in the Name of the whole Court for the Defendant. He ſaid they were all agreed, that the Exile intended by *Brown* was the leaving of his Country becauſe of the *States* diſpleaſure to him, and the withdrawing of his Penſion upon that diſpleaſure; Nothing of which is altered ſince the making of the Will, and therefore the Eſtate deviſed does continue.

* P. 193

* *Mors* againſt *Thacker.*

Caſe for ſome words, *cumq; etiam* other words, is good; otherwiſe in Treſpaſs. 1ſt Count lays the words *in auditu quamplurimorum*; the laſt does not, yet good. 2 Jo. 197. 2 Sho. Caſe 17. 415 & 294. 1 Com. Dig. 193, 195. Ld. Raym. 959. Cowp. 276. 1 Lev. 338.

CASE for Words, and declares; That whereas the Plaintiff was of good Fame, the Defendant *in præſentia quamplurimorum* ſpoke ſuch and ſuch Words (which were actionable) *cumque etiam* the Defendant *poſtea tali die ex ulteriori malitia* ſpoke other Words (which were alſo actionable.) After Verdict for the Plaintiff and entire Damages, it was twice moved in arreſt of Judgment by *Pemberton* and *Tremail*, and two Exceptions taken; 1. That the laſt Count is not affirmative that he ſpoke the Words, but under a *cumque etiam*, which in Treſpaſs hath been ſeveral times ruled naught; and then the Damages being intire, the Plaintiff cannot have Judgment for any part. *Sed non allocat'*. This is well enough in an Action upon the Caſe as this is, though in Treſpaſs it has been ruled ill. *Nota, ſimilis Caſus & ſimile Judicium inter Cotterell & Matthew; Mich.* 4 *W. & M. in Com. Ban. ſed intrat. Trin.* 4. *Rot.* 837. 2. The laſt Words are not ſaid to be ſpoken *in præſentia & auditu quamplurimorum. Sed non allocatur*; The firſt *audita quamplurimorum* goes to all. And Judgment was given for the Plaintiff.

Merchant againſt *Whitepane.*

Preſcription for a ſeat belonging to his Meſſuage, without ſaying time out of mind they had the ſeat.

CASE; for that he is ſeiſed in Fee of a Meſſuage, and he, and all thoſe whoſe Eſtate he hath in the Meſſuage, have had a Seat in the Church, and *toties quoties neceſſe fuit* have repaired it, and the Defendant diſturbed

diſturbed him of his Seat. After Verdict for the Plaintiff upon *Non Culp.* it was moved in arreſt of Judgment by *Saunders*, that the Plaintiff hath not preſcribed by a time out of mind, *&c.* *Curia.* It is ſaid that he was ſeiſed in Fee, and that he, and all thoſe whoſe Eſtate he hath, have had this Seat, and the Fee hath been time out of mind, *&c.* by conſequence therefore he, and all thoſe whoſe Eſtate he hath, have time out of mind had this Seat. But eſpecially it is good in this Action, which is founded * upon his Poſſeſſion and the Diſturbance thereunto done, according to St. *John* and *Mowdy*'s Caſe lately reſolved in this Court.

3 Keb. 754. Ante 148. 1 Vent. 274.

* P. 194

Gregory againſt *Maior.*

ASSUMPSIT in Conſideration the Plaintiff promiſed to pay the Defendant ſo much yearly for five Years for ſuch a Thing, the Defendant aſſumed to ſave him harmleſs in the Poſſeſſion of it; and that ſuch a one had evicted him, and the Defendant had not ſaved him harmleſs. After Verdict for the Plaintiff upon *Non aſſumpſit*, it was moved in arreſt of Judgment, that it is not ſhewn that he was evicted by Title, and all Covenants of this Nature extend only againſt legal Title and Eviction. *Curia*, This Agreement is only *quoad* the Poſſeſſion, not *quoad* Title; and gave Judgment for the Plaintiff.

In Covenant concerning the poſſeſſion, eviction may be pleaded without ſhewing title. 3 Keb. 744, 755. Vid. 4 Co. 80. Al. 19. Noy 50. Yel. 30. Sty. 67. Cro. J. 315, 435, 444.

Cro. El. 437, 419. 1 Rol. ab. 430, 14. 1 Ven. 184. 3 Ven. 61, 62. 1 Lev. 301. 2 Lev. 37. 3 Lev. 385. 1 Mod. 101. 2 Mod. 213. 3 Mod. 135. 3 Saun. 178, 179. 1 Com. Dig. 174. Moor. 410. Bur. 2422.

Jepſon againſt *Jackſon.*

TRESPASS againſt Baron and Feme for entering his Houſe, and continuing Poſſeſſion for three Years: The Defendant pleaded *Non Culp. quoad* two Years;

Treſpaſs againſt Baron and Feme. Baron pleads a Licence to enter with his wife and ſervants. Plaintiff replies, *Non dedit licentiam* to the Baron and Feme, naught. 3 Keb. 755, 761.

and

and *quoad* the third, a Licence to the Huſband to enter with his Wife and Servants, and inhabit there; and the iſſue was, *Non dedit licentiam* to the Baron and Feme *modo & forma prout, &c.* and both iſſues found for the Plaintiff, and entire Damages; and this being in *Com. Banc.* a Writ of Error was brought, and it was aſſigned for Error, that the ſecond iſſue is impertinent and void; for when the Defendant pleads a Licence to him to enter with his Wife, &c. the Replication *quod non dedit licentiam* to the Huſband and Wife is foreign, and does not *meet* the Plea; for he may give Licence to the Huſband to enter with his Wife, and in ſuch Caſe the Licence is given to the Huſband only, and not to the Huſband and Wife; and this is a material difference, for the Licence amounts to a Leaſe, and if it be made to the Huſband and Wife, ſhe, as Survivor, ſhall have it; but if it be made to the Huſband only, the Wife ſhall not have it, as Survivor; and ſo, upon two ſeveral Debates twice this Term, held the Court, and reverſed the Judgment. *Levinz* for the Plaintiff, *Holt jun.* for the Defendant in *Error*.

* P. 195

* *Aſtry* againſt *Ballard*.

Plaintiff took one of the Defendants in execution; whether the bail be diſcharged as to the reſt. S. C. 1 Vent. 315. 1 Sid. 107, 2 Jon. 75. 2 Mod. 312. 3 Keb. 709, 723, 761, 765, &c.

SCIRE Facias againſt the Defendant as Bail for *A. B. C.* and *D.* The Defendant pleaded that before the Return of the ſecond *Scire facias* the Plaintiff took *A.* in Execution upon a *Capias*, and ſtill detains him. The Plaintiff demurred, and *Saunders* and *Levinz* argued that the Plaintiff having taken one of the principals in Execution had thereby diſabled the Bail to render him, and therefore diſcharged him *quoad* all the reſt. *Curia cont'*, The Bail having undertaken to bring in all the four principals, and therefore though the Plaintiff hath taken one, this does not diſcharge the Bail as to the other three; for they ought, as they took upon them, to bring in all the four; and gave rule for Judgment for the Plaintiff, *niſi, &c.* by ſuch a Day; when *Jones* Attorney General came and preſſed to be farther heard in the Caſe; for he ſaid, that the Plaintiff by taking one of the principals had determined his

his Election to have the principals in Execution, and thereby had discharged the Bail; and cited 1 *Roll.* 897. let. G.

Wade against *Hatcher.*

TRESPASS for entering his House, and taking divers Goods, and *inter alia unam parcellam pensarum laniarum*, Anglice, *a Quantity of Woollen Yarn.* After Verdict for the Plaintiff and entire Damages, Judgment was staid *ex motione Levinz*, for the Incertainty *de una parcella*, and what Quantity is meant by it.

Trespass for taking a parcel of Yarn.

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* Term. Sanct. Trin. * P. 196

ANNO

29 Car. II. in Banco Regis.

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* *Virtue* against *Birde.*

CASE that whereas the Defendant had hired him to carry a Load of Timber from *Woodbridge* to *Ipswich* to be laid there at any place the Defendant should appoint, and that he gave Notice to the Defendant that he

Case for not appointing a place to unload his Cart whereby his Horses took cold. S. C. 1 Ven. 310, 3 Keb. 766. 2 Cro. 386. 1 Roll. Ab. 101. Yelv. 30. 1 Sid. 146. Carth. 90. Salk. 102. 3 Term. Rep. 31.

he would carry it ſuch a Day, and requeſted the Defendant at *Woodbridge* to appoint where it ſhould be laid, and that accordingly he carried it to *Ipſwich*, and the Defendant appointed no place where it ſhould be laid, but made the Horſes of the Plaintiff being hot ſtay ſo long in the *Cart*, that they took Cold, whereby ſome of them died, and the reſt were ſpoiled; and after Verdict for the Plaintiff, upon *Non Culp.* Judgment was ſtaid, becauſe the Action lies not: For, firſt, he might have taken his Horſes out of his *Cart*, and have walked them up and down, or put them into the Stable. 2. As ſoon as he came there, and found no place appointed by the Defendant, he might have unladen the Timber in any convenient place, and returned; and therefore the Injury which the Horſes received is owing to himſelf, and through his own Default.

* P. 197

* *Harker* againſt *Moreland.*

Upon Oyer of Adminiſtration craved after imparlance, the Defendant pleads in abatement, that it is teſted ſince the action brought, and the action abated *per curiam ex officio.* 3 Keb. 968. Ante 190. 3 Lev. 55. 6 Mod. 80, &c. 1 Stra. 22. 2 Stra. 806. 1 Wilſ. 180. Comp. 454. 671. Doug. 62.

SCIRE *Facias* teſted 12th *Feb.* the laſt Day of *Hillary* Term, was brought by the Plaintiff as Adminiſtrator againſt the Defendant as Tertenant, who imparled generally, and after craved Oyer of the Letters of Adminiſtration, which were dated the 26th of *March* following in the Vacation between *Hillary* and *Eaſter* Term: Whereupon the Defendant pleaded this in Abatement. The Plaintiff demurred, becauſe he cannot plead in Abatement after general Imparlance; but *per Curiam*, It appearing now upon Record, that the Plaintiff hath brought his Action, the Court ought *ex officio* to abate the Writ; and ſo they did: And yet the Party could not have a *Scire facias* teſted after 12 *Febr.* in this Court, until Term *Paſch.* and it might *in rei veritate* have been ſued during the Vacation, after the Grant of Adminiſtration. *Aliter*, where the Suit is by Obligation out of the Chancery, for there the Court is always open; *tamen quære* of this Judgment; for it does not appear rightfully upon Record when the Adminiſtration bears Date, it being upon an *Oyer* after general Imparlance; *quære tamen*, for an Oyer may be after Imparlance.

Gamly

Gamly againſt *Bechinor.*

ASSUMPSIT; whereas *quidam* ..... *Alliſon* was indebted to the Plaintiff, who intended to ſue the ſaid ..... *Alli on*, the Defendant, in Conſideration the Plaintiff would forbear the ſaid ..... *All ſon*, promiſed him to pay the Debt. After Judgment upon Verdict for the Plaintiff in *C. B.* in *Non Aſſumpſit*, Error was brought in *B. R.* and it was aſſigned that it does not appear what *Alliſon* was intended in the Caſe; for it is *quidam Alliſon* without Chriſtian Name, and ſo it may be any *Alliſon* in the World; and *Rainsford* Chief Juſtice, and *Twyſden* held this an Error. But *Wylde* and *Jones contra*; Be it what *Alliſon* it will, the Defendant hath promiſed, and that is ſo * found, and this Judgment may be pleaded in Bar to any other Action brought in Conſideration of Forbearance of any *Alliſon* without Chriſtian Name, with an Averment that he is the ſame perſon; and rather than reverſe it for this Cauſe, they would intend *quidam* was his Chriſtian Name. *Quare adjournat'.*

Aſſumpſit on conſideration that he ſhould not ſue *quidam* .... *Alliſon.* 3 Keb. 769.

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Tripps againſt *Rand.*

ASSUMPSIT in Conſideration the Plaintiff at the Defendant's Requeſt would procure himſelf to be made a *Knight* at his own proper Charges, ſo that his Wife, the Defendant's Daughter, might be a Lady, to pay him 2000*l.* and ſays, that he procured himſelf to be Knighted at his own Charges, whereby his Wife became a Lady; yet the Defendant had not paid him. After Verdict and Judgment upon *Non Aſſumpſit in Com. Banc.* it was now aſſigned for Error in *B. R.* that it is not ſaid the Plaintiff procured himſelf to be Knighted at the Requeſt of the Defendant: It might be he did it of his own Head, and the Requeſt here is Part of the Conſideration, executory and traverſable, and by omitting it the Plaintiff hath loſt his Traverſe of the Requeſt; and upon *Non Aſſumpſit* he was not obliged

Aſſumpſit in conſideration the Plaintiff at the Defendant's requeſt would procure himſelf to be made a Knight, and ſaith that he procured himſelf to be made a Knight, but does not ſay at the Defendant's requeſt. 3 Keb. 769, 800.

obliged here to prove a Requeſt upon Evidence, as are the Caſes in *Hob.* 88. 106. and for Authority in Point, 2 *Leon.* 53. 3 *Leon.* 91. *Curia contra*, The Requeſt ſhall be intended here to be made at the time of the Promiſe; *ſcil.* that he then requeſted him to be made a Knight, and promiſed to give him 2000*l.* and it ſhall not be intended that he promiſed to give him the 2000*l.* if he would procure himſelf to be made a Knight when he ſhould afterwards requeſt him, and ſo the Requeſt is not executory, but executed at the time of the promiſe made: and they gave Rule to affirm the Judgment; but at the earneſt Motion of *Jones Attorney-General*, to be farther heard for the Plaintiff in Error, it was adjourned until next Term, when the Judgment was affirmed by the whole Court. *Vide* 1 *Cro. Poynter v. Poynter.* accordingly.

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* *Robinſon* againſt *Woolley.*

Archbiſhop, as Guardian of the Spiritualties *ſede vacante Glocestrienſi*, inſtitutes and ſends his Mandate to the Archdeacon to induct, but Induction is not made till after Biſhop conſecrated; it is void.

S. C. 1 Vent. 309. 319. 2 Jon. 78. 3 Keb. 747. 773. 821. 1 Vic Hob. 13. 185. Mo. 870. 5 Bac. Abr. 528. 1 Ver. 212. Sera. 810. 2 Will. 46. 5 Com. Dig. 611. 6 Rol. 125. 195. 294.

EJECTMENT, and upon *Non Culp.* and a ſpecial Verdict the Caſe was; The Biſhoprick of *Gloceſter* being void, and the Archbiſhop of *Canterbury Garaianus Spiritualium*, a Church became void, and the Patron preſented to the Archbiſhop, who admitted and inſtituted the Preſentee, and granted a Mandate to the Archdeacon for his Induction, who according to Uſage appointed certain Miniſters to do it, who for three or four Months neglecting to induct him, a new Biſhop of *Gloceſter* was made and conſecrated in the mean time: Afterward the Induction was made by the Miniſters, and whether this were a good Induction or not? was the Queſtion; which this Term and the next was argued by *Weſton* and *Holt jun.* for the Plaintiff, and by *Saunders* for the Defendant: For the Plaintiff it was urged, that the Suffragan Authority is derived out of the Authority of the Metropolitan, *Hob.* 185. 11 *H.* 7. 9. and therefore the Acts of the Metropolitan concerning any Thing which belongs to the Dioceſan are not void, but voidable. 2. He that hath a Power of inſtituting hath alſo the Power of inducting, *Lyndew.* 141. (the new edition) In this Caſe the Inſtitution is by the Archbiſhop, and therefore ſo ought the Induction; for

Autho-

Authority well commenced ſhall be perfected by the ſame Perſon; 2 *Cro.* 73, 83. 1 *Cro. Smith verſ. Executors of Pandrell.* And the Inſtitution here is the judicial Act, the Induction no more than a miniſterial Act thereupon. 3dly, Induction belongs to the Archdeacon *jure officii*, and the Mandate from the Archbiſhop for Induction is not authoritative, but only directive to certify what perſon he hath inſtituted, and when the Induction is done, it is by Virtue of a Power inherent in the Office of Archdeacon, and not by the Mandate from the Biſhop: 11 *H.* 4. 9. b. *Plowd. Com.* 529. *Hob.* 15. Afterwards towards the end of *Mich.* Term Judgment was given by the whole Court that the Induction was void, for though it belongs to the Office of Archdeacon to induct, yet he does it only by Mandate and Authority from the Biſhop; and they ſaid the Caſe is no more in Effect than if a Man makes a Letter of Attorney to make Livery, and dies, and the Attorney makes Livery after his Death.

* The King againſt Merchant-Taylors of *London*. * P. 200

Cuſtom of *London* to commit for not accepting the Livery. S. C. 1 Vent. 327. 2 Danv. 422. 3 Keb. 714, 764, 784, 799, 811. Vid. Sty. 78. Mar. 179. 1 Stra. 560. 5 Com. Dig. 197. 1 Ba. Abr. 681.

UPON a *Certiorari* was returned a Cuſtom for the Company of *Merchant-Taylors* to chooſe Liverymen, and for refuſing to accept of the Office to commit the Refuſers; and that *Smartford* was elected, and without reaſonable Cauſe refuſed, for which he was committed; to which return theſe Exceptions were taken by *Holt jun.* 1. This Cuſtom to commit is not good, for it does not concern the Government of the City, but only the State of the Company. 2. It does not appear that he was *habilis & idoneus*, and therefore not eligible, 2 *Leon.* 29. *March* 103. *Sed non allocatur*; for firſt, all their Cuſtoms are confirmed by Statute. 2. A Refuſal without reaſonable Cauſe implies him *habilis & idoneus*.

The

The King againſt the City of *London*.

Cuſtom of *London* to diſfranchiſe Freemen upon Information before the Mayor and Aldermen for ſpeaking diſgraceful words o an Alderman.
8. C. 1 Vent. 302, 327.
2 Show.
3 Keb. 764. 109. 811.
3 Keb. 714.
2 Salk. 426.

UPON a *Habeas Corpus* and *Certiorari* they returned the Cuſtom of *London*, that if any Freeman of the City ſpeak diſgraceful Words of an Alderman, that for ſuch ſpeaking the *Common Serjeant* hath uſually exhibited an Information before the *Mayor and Aldermen*, wherein if the Offender be convicted by *Verdict* or *Confeſſion*, the Uſe is to puniſh him by *Fine* or *Diſfranchiſement*, and that *Clark* ſpoke ſcandalous Words of Alderman *Lawrence*, as he was ſurveying the Meaſures of Coals; *ſcil. That he would undo the City, and that he was a Knave, &c.* for which the Common Serjeant exhibited an Information, whereupon he was taken and impriſoned. To which Return theſe Exceptions were taken; 1. This Cuſtom to try a Man for Words ſpoken of an Alderman in the Court of Aldermen is unreaſonable; it is to make them Judges and Parties. 2. It does not appear by the Return that *Clark* was a Freeman. In the Information indeed, which is returned *in hæc verba*, he is ſaid to be a Freeman, but that is not ſufficient; the Return itſelf muſt ſet forth in Fact, that he was a Freeman; for upon this Return, as it is here, he cannot have an Action upon the Caſe for the * Falſity of the Return, if he be not a Freeman. 3dly, This Cuſtom to diſfranchiſe for Words is void, 11 *Co. Bagg's Caſe.* To which it was anſwered, that their Cuſtoms being confirmed by the Statute of *R.* 2. as it appears by the Record, the Cuſtom thereby is made good; and for that Omiſſion in the Return, in not ſaying he was a *Freeman*, they ſaid they had a multitude of Precedents after that Form, and Proceedings upon them; which the Court deſired to ſee, but none were produced, and the Parties agreed in the mean time; upon which the Court was afterwards moved by the City Counſel for a *Procedendo*, but the Court would not grant it without farther Argument, ſaying it might be dangerous to put it in the Power of the Aldermen to diſfranchiſe a Freeman for ſpeaking Words of an Alderman; and though the Words were here ſpoken to him in the Exerciſe of his Office of Alderman and Juſtice of Peace, yet they ſaid

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ſaid it would be more reaſonable to puniſh him by Fine and Impriſonment, which might be by Information in this Court, but this Court cannot diſfranchiſe him.

Butts againſt *Penny.*

TROVER for 100 *Negroes*, and upon *Non Culp.* it was found by ſpecial Verdict, that the *Negroes* were Infidels, and the *Subjects of an Infidel Prince*, and are uſually bought and ſold in *America* as Merchandiſe, by the Cuſtom of Merchants, and that the Plaintiff bought theſe, and was in poſſeſſion of them until the Defendant took them. And *Thompſon* argued, there could be no Property in the Perſon of a Man ſufficient to maintain *Trover*, and cited *Co. Lit.* 116. That no Property could be in Villains but by Compact or Conqueſt. But the Court held, that *Negroes* being uſually bought and ſold among Merchants, as Merchandiſe, and alſo being Infidels, there might be a Property in them ſufficient to maintain *Trover*, and gave Judgment for the Plaintiff, *niſi Cauſa*, this Term; and at the end of the Term, upon the Prayer of the *Attorney-General* to be heard as to this Matter, Day was given until next Term.

Trover for Negroes. S. C. 3 Keb. 785. Vid. 3 Lev. 336, 337. Vid. 2 Salk. 666, 667. contra. See 5 Mod. 182, 186, 187. Raym. 16. 3 Lev. 336, 337. Cro. Jac. 262, 463. Cro. Car. 19, 391, 545. Mar. 12. Cro. El. 126. Heb. 283. 1 Com. Dig. 219. 1 Salk. 656. 1 Raym. 250.

5 Mod. 375. 5 Com. Dig. 352. 5 Bac. Ab. 264.

* *Smithe* againſt *Abell.* * P. 202

EJECTMENT, and upon *Non Culp.* and a Special Verdict, the Caſe was; Tenant for Life, Remainder for Life, Tenant for Life levied a Fine to him in Remainder for Life and his Heirs, *ſur conuſans de droit*; and *per Curiam*, without Argument, Both their Eſtates are hereby forfeited, the one by the Gift, the other by the Acceptance of ſuch Eſtate.

Tenant for Life levies a Fine to him in Remainder for Life; it is a forfeiture of both Eſtates. S. C. 2 Jon. 65. 3 Keb. 787, 733. 11 H. 4. 10.

Vid. Ow. 156. Cro. El. 757.

Forteſcue

Forteſcue againſt *Abbott.*

Deviſe to his 3 Sons ſeverally of ſeveral parts, and if any one die, his part to go to the others, the reverſion deſcends to the eldeſt; this will deſtroy the contingent remainders to the other. But it is good by way of executory Deviſe. 8. C. 2 Jon. 79 80. 2 Danv. 519. pl. 14. 3 Keb. 788, 824. Vid. 1 Lev. 135.

EJECTMENT, and upon *Non Culp.* and a Special Verdict, the Caſe was; one having three Sons, *A.* the firſt, *B.* the ſecond, *C.* the third, deviſed a part to each without any Limitation of Eſtate, and if any of them die, that his part ſhall remain to the reſt. *John* died, and whether his part ſhould remain? was the queſtion: And it was argued by *Saunders*, that it ſhould not remain, but the Remainders are contingent, and the deſcent of the Fee upon *John* deſtroyed the particular Eſtate deviſed to him, and conſequently the Remainder to the others. *Pollexfen* anſwered, that it might be good by way of Executory Deviſe, according to the Opinion of *Fleming* in *Wood* and *Ingerſole's Caſe*, 2 *Cro.* 260. contrary to the Judgment of that Caſe; *& adjournatur* till *Paſch.* 30. *poſtea*, when, *ut audivi*, the Court adjudged it to be a good executory Deviſe to the younger Sons, according to the Opinion of *Fleming*, and contrary to the Judgment of *Wood* and *Ingerſole's Caſe.*

2 Jon. 452. R[a]y. 162. 1 Sid. 153. Vaug. 259. 2 Saund. 386. 1 Bulſt. 61. 2 Cro. 260, 655. Ante 39. Vid. 2 Cro. 590, 655, 695. Cro. El. 833, 204. 225. Godb. 282. Pal. 131. Dy. 33, 124. Bridgman 1. Mo. 422. 2 Leon. 11. 3 Leon. 64. 1 Rol. Abridg. 611, 839, 835, 836 b. 2 Rol. Rep. 196, 281. 3 Com. Dig. 226. 4 Bac. Abr. 332. Pearne. C. Rem. 264. Pow. on Dev. 418. Doug. 502.

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* *Taylor* againſt *Bekon.*

Payment to a Gaoler, or to the Sheriff upon a *Ca. Sa.* is no Plea in Debt upon a Judgment, but payment to the Sheriff upon a *Fi. Fa.* is. 8. C. 2 Jon. 97, 98. 3 Keb. 748, 788. Q. 1 Lev. 260, Vide 3 Co. Ridgeway's caſe. 8 Co. Dr. Drury's caſe. 1 Leon. 141. Cro. El. 390. Cro. Car. 328 1 Crom. Prac. 364. 4 Bac. Abr. 76. Cowp. 728. 2 Term. Rep. 45.

DEBT upon a Judgment: The Defendant pleads, that he was taken upon a *Capias*, and committed to the Marſhal of this Court, and that he had paid the Money to him in Satisfaction of the Judgment; upon Demurrer adjudged no Plea, for the Marſhal is not to receive the Debt, but only to detain the Defendant in Priſon until he hath paid it to the Plaintiff. But Payment to the Sheriff upon a *Fieri Facias* is a good Plea, for he hath thereby an Authority to levy the Debt; but Payment to the Sheriff upon a *Capias ad ſatisfaciend'* is perhaps no Plea for the Reaſon aforeſaid.

Term.

Term Sanct. Mich.

ANNO

29 Car. II. in Banco Regis.

Sir John Lawrence againſt *Blithe.*

DEBT in *London* againſt the Defendant, as *Heir*, being removed hither, the Queſtion was, if the Heir ſhould find Bail here, as he did in the inferior Court of *London*, where they compel all Defendants, Heirs or Executors, to find Bail? And there are Precedents wherein Executors, being held to Bail there, were here alſo upon Removal forced to find Bail: But no Precedent being ſhewed of Bail found by an Heir in ſuch Caſe, the Court denied to hold the Defendant to Special Bail in this Caſe: And it was ſaid, that *Kelynge* and *Hale* had denied it upon Removals in the Caſe of Executors.

Upon Removal from an inferior Court an Heir ſhall not be held to Bail, as he was below.
S. C. 2 Jon. 82.
3 Keb. 803.

Clappe againſt *Edgecombe.*

DEBT was brought in *B. R.* upon Stat. 5 *Eliz.* for uſing a Trade in *Devonſhire*, which was ſent by *Niſi prius*, and tried in *Devonſhire* for the Plaintiff; and now it was moved in arreſt of Judgment, that the Action ſhould have been brought as well as tried in *Devonſhire*. To which it was anſwered, that in *Hughes* and *Barnes's Caſe* it was reſolved, that Debt lay in this Court: But it was replied, that after that *Caſe inter Nicholls*

Debt upon the 5 *Eliz.* ought to be laid in the proper County.
S. C. 3 Keb. 804.
1 Lev. 249, 250

* P. 205 *Nicholls and Cochinell*, in the Time of * *Hale* Chief Juſtice, it was adjudged that the Action ought to be brought in the proper County, upon which the Court ordered the Caſe to be put in the Paper.

Foſter againſt *Hawden.*

Jury caſt Lots for their verdict. Ante 240. 2 Jon 82. 3 Bac. Abr. 282. Bullert N. P. 308. 2 Hale's P. C. 296. 2 Hawk. P. C. 221.

TRESPASS tried by *Niſi Prius* in *Northumberland*: The Jury not agreeing caſt Lots for their Verdict, and gave it according to Lot; for which, upon the motion of *Levinz*, the Verdict was ſet aſide; and ordered the Jury to attend here next Term to be fined.

Nota, In *Hale*'s Time, in a Caſe between the King and the Lord *Fitzwater*, a Verdict was ſet aſide for the ſame Cauſe.

Richard Froude againſt *Froude.*

He would have *A.* rob the Houſe of *B.* and he *(innuendo A.)* did rob him; actionable. 8. C. 2 Jon. 84. 1 Vent. 323. 3 Keb. 805. 812, 841. 1 Com. Dig. 276. 4 Bac. Abr. 508 1 Str. 194. Hob. 140.

CASE for theſe Words; Richard Froude *went to* Dean's *Houſe, and would have had him to rob* Bolton's *Houſe, and he (præd'* Richard Froude innuendo, *did rob him.)* After Verdict for the Plaintiff upon *Non Culp.* Judgment was ſtaid, becauſe it does not appear but by the *innuendo* who it was that robbed *Bolton*'s Houſe, and the *innuendo* does not ſufficiently ſhew it; for it is but the Plaintiff's Inference, or Conſtruction upon the Words that the Words were ſpoken of him. But afterwards upon Argument by *Maynard* for the Plaintiff, citing 3 *Cro.* 291, 308, 349, 618, 710, 747, 787. *Mo.* 63, 409, 410. that the firſt Words are actionable of themſelves, and the others for Aggravation; And by *Pollexfen* for the Defendant, citing 2 *Bul.* 206. 3 *Cro.* 167. *Co.* 4. 15. *b.* 18. *b. Lane* 98. *Telv.* 90. *contra*, Judgment was given by the whole Court, *ſcil. Kainsford, Twyſden*, and *Jones* for the Plaintiff, that the firſt Words of themſelves were actionable, and made worſe by the ſecond, whether the Robbery be intended done by the Plaintiff himſelf, or by any other at his Procurement.

The

* The King againſt *Plym.*

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INDICTMENT upon Stat 5 *Eliz.* for uſing the Trade of a *Coſtermonger*, or *Fruiterer*. The Defendant demurred to the Indictment, and *Pollexſen* argued for the Defendant, that the *Fruiterer* is not a Trade within the Statute, 2 *Bulſt* 188. *Dolbyn* Recorder of *London contra*, a *Barber* hath been adjudged a Trade within the Statute, which was agreed, But *Twyſden* and *Jones* held ſtrongly a *Fruiterer* was no Trade within the Statute; *Rainsford* doubting, *Wylde* abſent, it was adjourned.

Coſterwonger, if a Trade within the 5 *El.* S. C. 1 Vent. 326. 346. 3 Keb. 816, 843. 5 Eliz. 1 Rol. Rep. 10. A *Barber* is. 5 Eliz. Vid. 1 Lev. 87.

Wettenhall againſt *Sherwin.*

ERROR of a Judgment in Battery in *Cheſter*, aſſigned by *Levinz*, that the Declaration is by Way of Recital, *quod cum* he was beaten, *&c.* upon which the Judgment was reverſed, *niſi*, *&c.* when *Saunders* came and prayed a new *Certiorari*, for the Record is right there, but badly certified. To which it was anſwered, that Diminution cannot be alledged of a Thing which is fully certified, but in ſomething that is wanting, as Want of Original, Warrant of Attorney, *&c.* Of which the Court would hear farther next Term; *Quare adjournatur.*

Battery *per quod cum*, *&c.* Vide 2 Jon. 197. 2 Show. Caſe 17, 180, 294. & 2 Salk. 636, *&c.* ib. *Certiorari* to *Cheſter* upon Error in a Record fully certified. *Quære*, if it lies.

Harper againſt *Burgh.*

COVENANT, and declares, that Leſſee for forty Years demiſed to the Defendant for twenty Years, rendering 16*l. per annum* Rent: and that the Defendant covenanted to pay it, and that afterwards he in Reverſion upon the new Leaſe for 40 Years aſſigned his Term to the Plaintiff; to which the Defendant attourned, and aſſigns for Breach Non-payment * of 16*l.*

Leſſor grants his Reverſion, and after after Aſſignment releaſes Covenants to the Leſſee, but before Breach. S. C. 2 Jon. 104.

for a Year's Rent due at *Lady-Day*, 29 *Car.* 2. The Defendant pleaded, that before the Rent became due, the Leſſor releaſed all Covenants to him; upon which the Plaintiff demurred; and now by *Rainsford* and *Jones*, they two being only in Court, This Releaſe of the Leſſor to the Leſſee is a good Bar of this Action, being before Breach though after the Aſſignment, according to *Middlemore* and *Goodale's* Caſe, 1 *Cro. Sed ſtea Term. Paſch.* being moved again, and the Court full, Judgment was given for the Plaintiff, for they would intend the Action to be grounded upon the *Reddendum*, which is a Covenant in Law, which ran with the Reverſion at Common Law, before the Statute of *H.* 8. and paſſed by the Grant of the Reverſion, ſo that the Leſſor could not releaſe it after his Aſſignment; and *Middlemore's* Caſe is upon a Collateral Covenant.

1 Lev. 279, 280. Co Lit. 215. Allen 39. 2 Wilſ. 376. 5 Com Dig. 235. 2 Ch. Ca. 169. Doug. 329. 3 Term. Rep. 627

Philip Bickerſtaffe and Wife againſt *Percy*.

DEBT upon Judgment, and declared, that *Clarke* recovered 90*l.* and made the Plaintiff *Anne* Executrix, and died, and that ſhe took for Huſband *quendam Philippum Bickerſtaffe*. The Defendant pleaded, that the Plaintiffs were never married: The Plaintiff demurred; upon which the Declaration was adjudged ill, for *quendam Philippum Bickerſtaffe* ſhall not be intended the now Plaintiff *Philip*, according to *Dy.* 70 *b.*

Quidam J. S. intended a Stranger. 3 Keb. 810

Smartle againſt *Scholar*.

EJECTMENT, and in a Special Verdict upon *Non Culp.* the Caſe was: One ſeiſed in Fee deviſed to a Stranger and his Heirs after the Death of the Deviſor and his Wife; the Deviſor died, and whether

S. C. 2 Jo. 28 265, 266, 267. Vaugh. 262, 264. 1 Mod. 189. 1 Vent. 323.

& vide ibid. 376, and 1 Sid. 191. Raym. 453. Cro. El. 15. Cro. Jac. 75. Mo. 7, & 123. 1 Ro. Ab. 844. 1 P. Wm. 38, 473. Prec. Chanc. 439. 1 Burr. 553. 5 Burr. 2609. 2 Bl. Rep. 693. Cowp. 40. 43. Doug. 492, 498, 501.

ther the Stranger ſhould take preſently, or not until after the Death of the Wife? And whether ſhe ſhould have it for her Life by Implication? Was the Queſtion: And *Tremaine* argued, that the Stranger ſhall have it preſently, and the Wife nothing: Otherwiſe, he ſaid, if the Deviſe had been to the Heir after the * Death of the Wife, for then there is no one elſe to take in the mean time, *Mo. Paſch.* 7. 123. 2 *Cra.* 75. *Horton v. Horton. Conyia Courtney v. Pet. Bro.* 107. A Deviſe to a Stranger after the Death of the Wife is an Eſtate for Life to the Wife by Implication. But then, *ut videtur*, the Stranger is not to have the Eſtate until after the Death of the Wife, as well as the Huſband; and the Heir takes it in the mean Time; & *adjournatur*. But afterwards it was ſo adjudged.

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Vide 1 Vent. 376. 2 Vent. 342, 366. 2 Jon. 98. 1 Leon. 278. 2 Rol. 134. 1 And. 33. 2 Chan. R. 155. 1 Chan. R. 113. 1 Show. 25. 26.

The King againſt *Thompſon.*

ERROR of a Judgment on an an Indictment, which was, that the Defendant did *ſcienter receive and harbour* divers Robbers, to the Jury unknown, who had ſtolen ſeveral Goods, and committed divers Burglaries. The 1ſt Exception was, that this is too general, no more in Effect than *communis receptor felonum* and cited *Co.* 3 *Inſt.* 12, 13. Indictment for uſing *diverſas diabolicas artes*; and *Rolle Indictment* 79. *Communis oppreſſor vicinorum*, naught; but *communis Barrectator* is good; for it is a Term well known. 2. *Scienter recepit* is not good, but it ought to be that he knowing them to be *Robbers* received them; for he might know the Men, and not know them to be Robbers, 1 *Cro. Belton v. Banks*, & *ib. Kirmion v. Well*. 3. It ought to be *felonice recepit*; for the Receipt and Harbour of Robbers, knowsng them, is Felony. *Sed Non allocatur*; for *per Curiam*, 1. Perhaps the Felons, no more than the Felonies and Burglaries, could not be known particularly; and a Houſe that harbours Felons is a common Nuſance as a common Btwdy-Houſe is; and to the ſecond, *Jones* ſaid, that *ſcienter* had been lately ruled good in one *Sally*'s Caſe: And to the 3d; the King, if he pleaſe, may paſs by the

Indictment, *quod ſcienter recepit* divers Robbers, and does not ſay *felonice*, nor *ſciens* them to be Robbers. 3 Keb. 674, 375, 760, 782, 817. Vide 6 Mod. 311. 3 Inſt. 213. Hob. 138. 2 Hawk. P. C. 323.

Felony, and make the Indictment for Treſpaſs; whereupon the Judgment was affirmed.

* P. 209

* *Ent* againſt *Withens.*

Debt counting of a *devaſtavit* upon Obligation lies not againſt Executors. S. C. 1 Vent. 315. 321. 3 Keb. 798, 825. Ante 40, 133, 145, 189. Vid. 1 Lev. 147, 255, 256. 2 Sho. 55, 56. 1 Vent. 315, 351, 355. 1 Saund. 216. 1 Sid. 397. Vi. ant. 166. 1 Lev. 227, 298. 1 Term. Rep. 691. Diſcontinuance after Argument.

DEBT upon an Obligation againſt the Defendant as Executor; and declares upon a *Devaſtavit*. Defendant pleads ſeveral Judgments and *nul aſſets ultra* 5*l.* liable to the Judgments, which is not ſufficient to ſatisfy them. The Plaintiff demurred, and upon Argument Judgment for the Defendant; for an Action upon an Obligation counting of a *Devaſtavit* againſt an Executor will not lie; *aliter*, in an Action upon a Judgment; for there the Plaintiff may count of a *Devaſtavit*. Upon which the Plaintiff prayed Leave to diſcontinue, and had Leave.

Baſtard againſt *Stukely.*

No Survivorſhip by the Eccleſiaſtical Law. S. C. 2 Sho. pa. 50. 2 Jon. 130. Vid. 2 Jon. 162. 1 Lev. 164. 2 Sho. 50. Prohibition.

ONE deviſed Goods to *A.* and *B.* the Executor aſſented to the Legacy, and afterward *A.* died; and now the Executor of *A.* ſued in the Spiritual Court for *A*'s Share, there being no Survivorſhip in ſuch Caſe by the Laws Eccleſiaſtical; whereupon *B.* ſued a *Prohibition*, and declared, and upon Demurrer and Argument it was adjudged the *Prohibition* ſhould ſtand; for by the Aſſent of the Executor the Intereſt was veſted in the Legatees, and became a Chattel in them governable by the Rules of the Common Law.

Beverſham

Beverſham againſt *Oſborne.*

DEBT for Rent. The Defendant pleaded *Actio non, &c. quia dicit, &c.* when it became due, *paratus fuit, & adhuc paratus exiſtit ſolvere, & profert hic in Cur'* the Money. The Plaintiff demurred, and the Plea was adjudged ill; 1. Becauſe he does not plead an *obtulit.* 2. The Plea is not to the Action, but only in Excuſe of Damages.

Debt for Rent, pleads, *paratus fuit ſolvere* without *obtulit.* S. C. 1 Vent. 322. 3 Keb. 800, 810, 828. Vid. Ray. 419.

Quære of the firſt Reaſon, for Rent is demandable; otherwiſe of a Sum in groſs which is payable without Demand.

1 Rol. 573. 3 Lev. 104.

* *Ingram* againſt *Bray.*

* P. 210

REPLEVIN; Defendant made Conuſance for Rent and Heriot, as Bailiff to *J. S.* The Defendant pleads in Bar as to the Rent a Releaſe of all Demands; and as to the Heriot, that *A.* and *B.* as Bailiffs to the ſaid *J. S. auter foits* made Conuſance in *Com. Banc.* and pleads the Record at large, *prout patet, &c.* The Defendant demurred, and *Pollexfen* argued, that the Bar was naught as to both Points; for 1. The Rent is incident to the Reverſion in this Caſe, and is not barred by Releaſe of all Demands, for the Releaſe does not bar the Reverſion, 2 *Cro. Hancock* and *Field's* Caſe; and *Fenn* and *Hanſon's* Caſe in this Court, *Paſch.* 15 *Car.* 2. But ſuch a Releaſe will bar a Rent-ſervice in Fee according to *Litt.* to which the Court inclined. 2. This is not good as to the Heriot, becauſe it is not ſaid, that the Conuſance in the Common Pleas was made by the Aſſent of *J. S.* for it might be by a Stranger without his Privity. Alſo there wants an Averment of a Life, as it appears by the Record here ſet

Releaſe of all Demands does not releaſe the Rent due upon a Leaſe. 1 Vent. 314. 2 Mod. 281. 3 Keb. 785, 829. Vid. 3 Lev. 273. 1 Lev. 99, 101. Poſt. 215, 216. 1 Mod. 99. 1 Sid. 141. In Replevin *auterfeits barr ſur conuſans* is no Plea, if it was not with the Conſent, or if the Judgment was given upon the Doug. 407. 1

Manner of Pleading. Vid. 1 Lev. 294, 295, &c. ib. Cowp. 805. 1 Term. Rep. 310.

ſet forth; and then the Judgment there being founded upon the Manner of the Plea, and not upon the Matter, it is no Bar here, where the Continuance of the Life is averred; to which the Court inclined likewiſe. But it was adjourned.

Dutton and Wife againſt *Poole.*

Son promiſed his Father to pay 1000*l.* to his Siſter, the Siſter may bring the Action. S. C. 1 Vent. 317, 318, 332. 2 Jon. 104. Ray. 302. 3 Lev. 139. * P. 211 3 Keb. 786, 814 &c. 4 Burr. 2237. Cowp. 294. 505. Promiſe to one to be performed to another. Vid. Lat. 206. Hetl. 176. Hard 321. Hutt. 105. Benl. 132. 3 C.o. 163. 619. 652. Sty. 6. 31. Raym. 202. 3 Keb. 786, 814, &c. 1 Rol. 31, 32. 1 Jo. 103. 1 Vent. 6, 7, &c.

ASSUMPSIT, and declares, that the Father of the Plaintiff's Wife being ſeiſed of a Wood which he intended to fell to raiſe Portions for younger Children, the Defendant being his Heir, in Conſideration the Father would forbear to fell it at his Requeſt, promiſed the Father to pay his Daughter, now the Plaintiff's Wife, 100*l.* and avers, that the Father at his Requeſt forbore, but the Defendant had not paid the 100*l.* After Verdict for the Plaintiff upon *Non Aſſumpſit*, it was moved in * Arreſt of Judgment, that the Action ought not to be brought by the Daughter, but by the Father; or if the Father be dead, by his Executors; for the Promiſe was made to the Father, and the Daughter is neither privy nor intereſted in the Conſideration, nothing being due to her: Alſo the Father, notwithſtanding this Agreement with the Son, might have cut down the Wood, and then there was no Remedy for the Son, nor could the Daughter have releaſed the Promiſe, and therefore ſhe cannot have an Action againſt him for not performing the Promiſe, and divers Caſes were cited for the Defendant, as *Yelv. Rippon v. Norton, Hawes v. Leader, Starky v. Milner,* 1 *Roll.* 31, 32. *Sty.* 296. and a Caſe lately reſolved *in Com. Banc. inter Norris & Pine, intrat. Hill.* 22 & 23 *Car.* 2. 1538. where the Caſe was; *If you will marry me, I will pay your Children ſo much*; and the Action being brought by the Children, adjudged it lay not. On the other ſide it was ſaid, if a Man deliver Goods or Money to *H.* to deliver or pay to *B. B.* may have an Action, becauſe he is to have the Benefit of the Bailment; ſo here the Daughter is to have the Benefit of the Promiſe: So if a Man ſhould ſay, Give me a Horſe, I will give your Son 10*l.* the Son may bring the Action, becauſe the Gift was upon Conſideration of

of a Profit to the Son; and the Father is obliged by Natural Affection to provide for his Children; for which Cauſe Affection to Children is ſufficient to raiſe a Uſe to them out of the Father's Eſtate; and therefore the Daughter had an Intereſt in the Conſideration, and in the Promiſe; and the Son had a Benefit by this Agreement, for by this Means he hath the Wood, and the Daughter is without a Portion, which otherwiſe in all Probability the Son would have been left to pay, if the Wood had not been cut down, nor this Agreement between him and his Father, and for Authorities of this Side were cited, *Roll.* 1 *Ab.* 31. *Oldman v. Bateman*, and *ibid.* 32. *Starky v. Meade.* Upon the firſt Argument *Wylde* and *Jones* Juſtices ſeemed to think, that the Action ought to be brought by the Father and his Executors, though for the Benefit of the Daughter, and not by the Daughter, being not privy to the Promiſe, nor Conſideration. *Twyſden* and *Rainsford* ſeemed *contra*; and afterwards two new Judges being made. *ſcil Scroggs* Chief Juſtice in Lieu of *Rainsford*, and *Dolbin* in Lieu of *Twyſden*, the Caſe was argued again upon the Reaſons aforeſaid; and now *Scroggs* Ch. Juſt. ſaid, That there was ſuch apparent Conſideration of Affection from the Father to his Children, for whom Nature obliges him to provide, * that the Conſideration and Promiſe to the Father may well extend to the Children: And he and *Jones* remembered the Caſe of *Norris & Pine*; and that it was adjudged as aforeſaid. But *Scroggs* ſaid, He was then and ſtill is of Opinion contrary to that Judgment. *Dolben*, Juſtice, concurred with him that the Daughter might bring the Action; *Jones & Wylde hæſitabant.* But next Day they alſo agreed to the Opinion of the *Chief Juſtice* and *Dolben*; and ſo Judgment was given for the Plaintiff, for the Son hath the Benefit by having of the Wood, and the Daughter hath loſt her Portion by this Means. And now *Jones* ſaid, He muſt confeſs he was never well ſatisfied with the Judgment in *Norris & Pine*'s Caſe; but being it was reſolved, he was loth to give his Opinion ſo ſuddenly againſt it. And *Nota*, Upon this Judgment Error was immediately brought; and *Trin.* 31. *Car.* 2. it was affirmed in the Exchequer-Chamber.

* P. 212

Holmes

Holmes againſt the Manucaptors of *Browne.*

Bail cannot plead leſſer Sum paid by the Principal to the Plaintiff in Satisfaction of the Judgment. Vide 2 Jon. 75, 188. 1 Mod. 24. 1 Bac. Abr. 218. 2 Term. Rep. 570.

SCIRE Facias upon a Judgment had againſt the Principal for 35*l.* 6*s.* 8*d.* Defendant being Bail pleaded, That the Principal after the Judgment paid the Plaintiff 34*l.* in Satisfaction of the Debt due upon the Judgment, which he accepted. The Plaintiff demurred, and had Judgment; for though the Bail may plead Payment to the Plaintiff by Reaſon of the Condition of his Recognizance, which is to pay the Condemnation or to render the Body, which the Defendant himſelf cannot plead; yet the Bail cannot plead Payment of a leſs Sum in Satisfaction of a greater after the Money was become due. *Pennel's* Caſe 5 *Co.* and here the Money was due immediately by the Judgment.

* P. 213

* *Walker* againſt *Hall.* In the Exchequer.

Feoffment with Letter of Attorney but no Livery nor Name of Attorney in the Deed, ſhall operate as a Covenant to ſtand ſeiſed. Vid. N. Lut. 243. Poſt. 225, 2 Jon. 105, 106. 3 Lev. 370.

EJECTMENT of Lands in *Durham* by *Quo minus* was ſent and tried at *Durham,* and upon a Special Verdict the Caſe was, *Maddiſon* being ſeiſed in Conſideration of Marriage, gave, granted and confirmed to *Margaret,* his intended Wife, *Habend' to her, her Heirs and Aſſigns,* with a Letter of Attorney in the Deed, but a Blank for the Attorney's Name. And the Deed was indorſed, *Memorandum,* that Livery and Seiſin was made *per* Attorney, leaving a Blank for his Name; but no Witneſſes of the Livery indorſed, but to the Sealing and Delivery of the Deed names of Witneſſes were indorſed. And whether this ſhould inure as a Covenant to ſtand ſeiſed to the Uſe of the Wife? was the Queſtion. Argued by *Shaftoe,* Serjeant for the Plaintiff, and by *Levinz* for the Defendant; and for the Plaintiff were cited *Sanders* and *Savil's* Caſe, *Com. Banc. Hill.* 1655. *Rot.* 1578. Adjudged, That the Grant of a Rent and Attornment by one who in Fact was not Tenant, and ſo no Attornment, ſhould inure as a Covenant to ſtand ſeiſed: And in *Croſſing* and *Scudamore's Caſe,* lately in *B. R.* there

was

was a Blank Letter of Attorney. To which it was answered for the Defendant, That *Croſſing* and *Scudamore* was a Bargain and Sale to the Son, and no Money paid, and that Deed inrolled, which it was held, might operate as a *Covenant* rather than the Conveyance ſhould be void. But there the Intent of the Party was only to paſs a Uſe, and ſince a Uſe could not paſs by Bargain and Sale for Want of Conſideration, it paſſed as a Uſe in another Manner as it could. But when the Parties Intent is to paſs an Eſtate as at Common Law, and not by Way of Uſe, as it apparently was in this Caſe by the Letter of Attorney, and the Indorſement; though the Deed be void as to this Purpoſe, it ſhall not operate by way of Uſe. *Co. Lit.* 49, *a.* 2. *Roll.* 787. *Pl.* 1. 5. *Tibb & Popleſthwait's* Caſe, where the ſame Point was adjudged that was afterwards in *Croſſing* and *Scudamore's* Caſe. If a Letter of Attorney had been in the Deed, it could not have paſſed by Way of Uſe, for the Alteration of the Warranty. Here the blank Letter of Attorney is ſufficient to ſhew the Parties Intent was to paſs the Eſtate as by Conveyance at Common Law, and not by Way of Uſe. And *Pitfield* and *Prince's* Caſe, 2 Rol. 789. nu. 2, Father grants * to the Son without Letter of Attorney; yet that ſhall not amount to a Covenant to ſtand ſeiſed. And *Foſter & Foſter's Caſe, nuper in B. R.* where the Mother by Articles doth grant and demiſe to the Son in the preſent Tenſe; yet that ſhall not operate as a Covenant to ſtand ſeiſed, *& adjournatur.* But afterwards, as I heard, Judgment was given by all the Barons, That this ſhould operate a ſa Covenant to ſtand ſeiſed: I did not hear their Arguments, but I was informed they principally relied upon the Caſe of *Croſſing* and *Scudamore.*

Ante. 9. 1 Mod. 175 176. 1 Vent. 137, 138.

Ante pa. 9. 3 Lev. 372. 1 Vent. 137. 1 Mod. 175.

* P. 214

Cockaine

Cockaine againſt *Hopkins.* In the Exchequer.

Runnagate Rogue, and if he had his Deſerts he would be hanged, ſaid of one who uſed the Trade of Buying and Selling, not actionable. Vide poſt. 233.

CASE, That whereas the Plaintiff for 7 Years laſt paſt, *artem vendendi barganizandi & emendi legitime uſus fuit,* and thereby had gained great Profit for the Support of himſelf and his Family, the Defendant *injurioſe falſo & malitioſe* ſaid of him, *He is a runnagate Rogue, and worſe than a Rogue, and if he had his Deſerts he had been hanged,* whereby he loſt his Cuſtom, but does not alledge any ſpecial Damage. After Verdict for the Plaintiff, and divers Books cited *pro & cont.* Judgment was ſtaid, and the Words adjudged not actionable; for *per Cur'*, *Runnagate* is not of the ſame Senſe with Bankrupt; and the Plaintiff does not ſhew what was the Trade he uſed, it might be a *Tinker* or a *Pedlar*, who travel up and down the Country, and are Rogues by the *Stat.* of *El.* And what follows, *and deſerveſt to be hanged*, are not actionable. *Sed quære* by Reaſon of the Words, *deſerveſt to be hanged.*

Morris againſt *Wilford.*

General Releaſe reciting the particular Purpoſes and for what it was made. S. C. 2 Show. * P. 215 pl. 32. 5 Keb. 814, 840. Ante, 210. 3 Lev. 273, 274. 1 Lev. 99, 110, 272. 1 Sid. 141. 2 Show. 90. 1 Mod. 99. 1 Vent. 314. 3 Mod. 281.

COVENANT againſt the Defendant, as Executor of Sir *Samuel Starling*, upon an Indenture made between the Plaintiff of the one Part, and Sir *Samuel Starling*, and *Mary* his Wife, on the other Part, reciting, Whereas *Richard Garford*, Father of *Mary*, had deviſed to the Plaintiff divers Lands and Goods in Truſt for the ſaid *Mary*, and that her Huſband * ſhould not intermedle with them, and that Suits and Differences having been touching the Eſtate ſo deviſed, it was agreed, That Sir *Samuel Starling*, the Huſband, ſhould have 2000*l.* out of the Eſtate, and that he ſhould releaſe all his Title to the Reſidue, and covenant that he would not, *plus ſectare turbare vel moleſtare* the Plaintiff, *pro vel concernen' Stat. præd'* Garford *vel receptione vel retentione inde*; and aſſigns for Breach, That Sir *Samuel* afterwards ſued the Plaintiff by *Engliſh* Bill in the Exchequer to have an Account of the Eſtate

Eſtate of *Garford*, and thereby put him to the Charge of 300*l.* The Defendant pleads, That by Indenture after the Death of Sir *Samuel* made between the Lord *Grandiſon*, the Huſband and of the ſaid *Mary*, and the Plaintiff, of the one Part, and the Defendant of the other Part, The Lord *Grandiſon*, and the ſaid *Mary*, and the Plaintiff, releaſe to the Defendant *totu' eorum jus titulum clameum & demand'* to the Brew-Houſe, of Sir *Samuel*, and to all the Brewing Veſſels, and all Claim and Demand to the Brewing Veſſels, and all their Claim and Demand to the Perſonal Eſtate of Sir *Samuel*, *virtute conſuetudinis Civitatis* London *vel aliter quocunque modo.* Upon which the Plaintiff demurred; and now it was argued for the Plaintiff, That this Releaſe cannot bar the Plaintiff, 1. Becauſe the Releaſe was made for a particular Purpoſe, *ſcil.* to releaſe the Wife's Cuſtomary Part, and the general Words, *vel aliter quocunque modo*, do not extend to foreign Matter; *ſcil.* Damage to be recovered for Breach of Covenant with the Plaintiff, though he be the Executor of Sir *Samuel.* 2. Releaſe of all Demands to the Perſonal Eſtate of Sir *Samuel* will not bar *Morris*, the Plaintiff, becauſe at the Time of the Releaſe he had no Right to demand any Part of the Eſtate, but only to bring his Action againſt the Perſon, like the 25 *Aſſ.* 7. *tit. Execution*, 130. *Co. Litt.* 265. b. If the Conuſee releaſe to the Conuſor of a Statute all his Right in the Land, yet he may ſtill ſue Execution of the Land; for he had no Right nor Demand to the Land at the Time of the Releaſe, but only to have an Action againſt the Party, and the Land is not bound but in Reſpect of the Perſon. To which it was anſwered for the Defendant, That this Caſe is not like that of the Statute; for there the Perſon is bound, and he hath nothing to do with the Land but in Reſpect of the Perſon; but here he hath nothing to do with the Perſon but in Reſpect of the Affets, for without Affets, the Party being an Executor, is not chargeable. *Jones*, * *Wylde* and *Twyſden* Juſtices upon the firſt Argument were of Opinion, that the Releaſe is no Bar, notwithſtanding the general Words; for the Releaſe being made for particular Purpoſes the general Words are to be guided by the particular Purpoſes. *Rainsford* Chief Juſt. *contra.*

* P. 215 Vi. ante 210. 1 Lev. 99, 101, 235. 3 Lev. 273, 274. 2 Sho. pl. 32.

And

And after the Caſe had been argued at Bar ſeveral Times in *Hill.* 30 and 31. Judgment was given for the Plaintiff *per totam Curiam*. *Levinz* and others for the Plaintiff: *Saunders* and others for the Defendant.

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* P. 217

Term. Sanct. Hill.

ANNO

29 & 30 Car. II. in Banco Regis.

Loury againſt *Reynes.*

Where an Infant hath only Goods, the Eccle-aſtical Court may appoint him a Guardian.

PROHIBITION was prayed to the Eccleſiaſtical Court of *York* to ſtay a Suit there by a Curator, which that Court had appointed to an Infant who had only perſonal Eſtate, againſt another who detained the Perſon of the Infant from him; and the Suit was to have the Perſon of the Infant delivered to him. *Curia.* The Spiritual Court may appoint a *Curator* for an Infant that hath only perſonal Eſtate, but whether ſuch *Curator* can maintain an Action there for the Cuſtody of the Perſon? they ſeemed to doubt. But they granted a Prohibition, and ordered the Plaintiff to declare that the Matter might come judicially before the Court; accordingly it was done, and in *Hillary* Term 30 & 31. the Caſe came to be argued. The Decalration was, that the Title to *Guardianſhip* is determinable at Common Law; nevertheleſs, that the Defendant

Defendant had libell'd againſt him in the Spiritual Court, that by the *Canons* and *Eccleſiaſtical Conſtitutions* any Perſon having the Tuition of an Infant under Age committed to him by the Will of the Father, or *per Judicem competentem*, ought to have the Cuſtody of ſuch Infant and of his Portion, and that if any Perſon detain ſuch Infant or his Portion, he is puniſhable, and compellable by Eccleſiaſtical Cenſures to deliver up the Perſon and Portion of ſuch Infant to his *Tutor* or *Guardian*, and that the Cuſtody of *James Reynes*, * an Infant under the Age of 14. and of *Anne Reynes* under the Age of 12. both of them having Legacies left them by their Father, was upon the Probate of the Will committed by the Eccleſiaſtical Court to the now Defendant, Plaintiff there, Grandmother of the ſaid Infants, 'till the Son ſhould attain the Age of 14 and the Daughter the Age of 12. and that the Defendant there detained them. The Defendant pleaded *non proſecut' ſuit contra prohibitionem*; and *pro conſultatione habend'* he pleaded, that by the Common Law uſed and approv'd in *England*, if any Perſon by his Will bequeath Goods to his Infant Children, the Ordinary, before whom the Will is prov'd, hath us'd to commit the Cuſtody of Sons and their Portions 'till they come to the Age of 14. and of Daughters and their Portions 'till they attain the Age of 12. except where ſuch Children are in Cuſtody of any other by reaſon of *Tenure*, or by the appointment of their Father. And if any Perſon detain ſuch Infants or their Portions, to compel them by Eccleſiaſtical Cenſures to deliver them; and that the Father of theſe Infants deviſed Goods to them, but appointed no *Guardian*, and that they were not in the Cuſtody of any other *ratione tenuræ*, for which the Ordinary upon Probate of the Will committed them to the Cuſtody of the Plaintiff there, Defendant here; and that the Defendant there, Plaintiff here, detain'd them. The Plaintiff replied, that the Father of theſe Infants being ſick of a Diſtemper whereof he ſoon after died, during his Sickneſs conſtituted the now Plaintiff and his Wife, their Grandmother, (now dead) their *Guardians*, upon which he ſued the Defendant there for detaining them. The Defendant demurr'd, and now, *ſcil. Hil.* 30 & 31. it was argued for the Defendant, that where Infants have only Goods, the Spiritual Court may appoint them *Curators* or *Guardians*, *Swynb.* 175, 176, and then as the Appointment

* P. 218 Guardian ſues in the Eccleſiaſtical Court for taking away his Ward.

pointment of a *Guardian* belongs to them, ſo ought the Suit for Detainer from ſuch *Guardian*. 2. The Republication of a Commitment by the Father is not material, 1ſt. Becauſe it is not ſhewed to be by Deed, Teſtament, or *quo modo*. 2dly. One of the Guardians being dead, the Authority (for this is no more) is determined, *Dy.* the Lord *Bray's* Caſe. To which, 'twas anſwer'd for the Plaintiff, that ſuppoſing the Eccleſiaſtical Court hath Authority in ſome Caſes to commit the Cuſtody of Infants that have only perſonal Eſtate, yet as the Libel is here, the *Prohibition* muſt ſtand, and they ought not to be ſuffer'd to proceed upon ſuch Libel, and the *Prohibition* is founded upon the Libel; now the Libel is, that by the Laws Eccleſiaſtical every * Perſon having the Tuition of any Infant under Age committed to him by the Will of his Father, *vel per Judicem competentem*, ought to have the Cuſtody of ſuch Infant, and Suit in the Eccleſiaſtical Court for Detainer of them. And this include Commitments by the Father upon *Stat.* 12 *Car.* 2. which appoints a Remedy in other Courts: And alſo comprehends all Guardianſhips at Common Law, of which the Spiritual Court hath no Power; and though the Declaration abridges the Matter by an Exception (*ſcil.* excepting where they are in Cuſtody of any other *ratione tenuræ*, or by the appointment of the Father) yet this will not amend the Libel. And ſo held the whole Court, and that they ought not to be ſuffered to proceed upon ſuch Libel. 2. It was anſwered, That the Commitment to the Father is well pleaded, without ſhewing how; for it might be by Parol, or by Delivery of the Infant; and the 26 *E.* 3. 65 is the Caſe in Point admitted. To which *Scroggs*, Chief Juſtice, agreed. 3. It was ſaid, That the Cuſtody of an Infant is an Intereſt, and may ſurvive, 2 *Cro. Shopland v. Rider.* He may make a Leaſe in his own Name; it is grantable over, *F. N. B.* 142. *P. Latch.* 157 *Mich.* 8 *Ed.* 4. *pl.* 2. But as to this Point the Court ſaid nothing. 4. It was ſaid, That admitting the Eccleſiaſtical Court may appoint ſuch *Guardian*, yet it does not follow that the Guardian muſt ſue there for Detainer. *F. N. B.* 142. *G.* the Mayor, *&c.* may commit Orphans, and yet the Suit for Detainer muſt be in other Courts. To this likewiſe the Court ſaid nothing. But for this Fault in the Libel it was unanimouſly reſolved, the Prohibition ſhould ſtand. *Levinz* for the Plaintiff, *Holt, junior*, for the Defendant in the Prohibition.

* P. 219

Prohibition ſhall ſtand, if the Libel be inſufficient, though the Declaration upon the Prohibition be ſufficient

Term-

Termino Paſchae,

ANNO

30 Car. II. in Banco Regis.

Seaton againſt *Henſon.*

DEBT upon an Obligation made to *A. B.* and *C.* wherein they were jointly and ſeveraliy bound, and the Action now brought againſt *A.* only. The Defendant upon *Oyer* of the Obligation pleaded that the Seal of *B. fuit divulſus*, and therefore the Obligation cancelled and made void as to all. The Plaintiff demurred; and now *Pollexfen*, for the Plaintiff argued, That the Obligation being Joint and Several, it is ſtill good as to the Reſt. 5 *Co. Mathewſon's Caſe.* To which it was anſwered, That the Obligation being at firſt joint and ſeveral as to all three, by this cancelling of it as to one, it ceaſes to be ſo, and therefore the Obligation is wholly void; for it is not now an Obligation of the ſame Nature as it was when it was firſt executed. *March. Rep. Watford's Caſe.* The Court at firſt doubted; but afterwards upon ſight of *Watford's Caſe*, and another Caſe which *Wylde* remembered to be ſo adjudged, *inter Bloom* and *Tracy*, the whole Court gave Judgment for the Defendant.

Three jointly and ſeverally bound, if the Seal of one be torn off, the Obligation is void *in facto*
S. C. 2 Show. 28.
1 Salk. 52, 53.
2 Salk. 574.
Bull. N. P. 268.
5 Com. Dig. 232.
Cowp. 600.

The

* P. 221

* The King againſt *Marid.*

Indictment of Forgery wanting *vi & armis.* 5 C. 2 Show. pl. 2. Forgery *ſuper caput ſuum proprium.* Vide 1 Jo. 425. 1 Lev. 138. 3 Mod. 66. Raym. 81. Ante 21.

ERROR of a Judgment upon an Indictment for Forgery aſſigned, 1. Becauſe the Indictment wants *Vi & Armis*, and this Indictment is not for a *Non-ſeaſanze* but a *Male-ſeazance.* 2. The Indictment is, That he forged it *ſuper caput ſuum proprium* inſtead of *ex Imaginatione ſua propria*, or *ex capite ſuo proprio*; for as it is it muſt be intended that the Writing was writ *upon his Head*, and that might be by another. 3. The Jury find him guilty *de Trangreſſione contempt. & forgeria prædict'*, and there is no ſuch *Latin* Word as *Forgeria:* But the *Latin* Word is *Fabricator.* And then the Defendant is not found guilty of the Forgery, and yet Judgment is given againſt him for the Whole; and as to the Word *Trangreſſio*, there are other Treſpaſſes laid in the Indictment to anſwer that. As to the firſt *Jones*, Juſtice, anſwered, It is cured by the expreſs Words of Statute 37 *H.* 8. and *Hart's* Caſe, 2 *Cro.* is ſo reſolved. But *Twyſden* and *Wylde totis viribus contra*; for multitudes of Indictments have been quaſhed for this Cauſe, and without *Vi & Armis* no *Capiatur* can be awarded, nor Fine to the *King*; and to this *Rainsford*, Chief Juſtice inclined, whereupon *Curia adviſare vult.* But as to the ſecond, it is but a literal Tranſlation of the Words of the Statute, and therefore the whole Court held it well enough, though they be not ſo elegantly tranſlated as they might be 3. *Tranſgreſſ. prædict.* includes the Forgery, and all other Treſpaſſes. *Poſtea Trin. prox.* upon reading the Stat. 37 *H.* 8. and ſeveral Peruſals of it, it was agreed by the whole Court that the Want of *Vi & Armis* is cured. *Similis Caſus ante Trin.* 2 *Car. int. Regem & Newton.*

In Indictment of Forgery, Jury found him guilty *de tranſgr' & forgery prædict.* omitting *Publication. Tranſgreſſ. prædict.* ſupplies it. Vide ante. 111. 2 Hawk. P. C. 340.

Term-

Term Sanct. Trin:

ANNO

Car. II. in Banco Regis.

Cory againſt *Pepper.*

A *Prohibition* was prayed and granted *niſi Cauſa* upon a Suit in the Spiritual Court, for teaching a School without Licence, in Contempt of the Canons, and now upon hearing Counſel of both Sides a Conſultation was granted; for though the Statute of Uniformity in the 13 *Car.* 2. gives a Penalty of 5*l.* in ſuch Caſe, for which the Suit muſt be at Common Law; yet that does not take away the Juriſdiction of the Spiritual Court, when they proceed upon the Canons, and not upon the Statute for the Penalty. And the Canons made *ann.* 1571 in the Reign of Queen *Eliz.* and in 21 *Jac.* being confirmed by Q. *Eliz.* and K. *James* are good and valid *per Stat.* 25 *H.* 8. ſo long as they neither impugn the Common Law, nor the King's Prerogative. Before the Stat. 25 *H.* 8. the Clergy made Canons without the King; but now they are reſtrained by that Statute *cap.* 19. yet ſtill notwithſtanding that Statute the Clergy may make Canons with the King's Conſent, provided they be not contrary to the Laws of the Land, nor derogatory to the King's Prerogative; which cannot be ſaid on theſe Canons requiring a School-maſter ſhould be licenſed

Suit in the Spiritual Court for keeping of a School without Licenſe from the Ordinary. Nell. Lutw. 341

What Canons oblige in *England.* 2 Vent. 10, 44. Vaugh. 327. Mo. 783 907. Cro El. 278.

The Spiritual Court may hold Plea of Matter prohibited by Stat. unde Penalty, ſo as they proceed upon the Canons, and not upon the Penalty.

by the Biſhop of the Dioceſs, to the end Schoolmaſters may be fit to inſtruct their Scholars in the true Principles of Religion. *Williams* for the Plaintiff, *Levinz* for the Defendant in the * Prohibition.

* P. 223

The King againſt *Leaver.*

Certiorari to the County *Palatine*, how it ſhould be directed.

ERROR of a Judgment upon an Indictment of Barretry in *London*, an Exception was taken to the Writ. *Firſt*, becauſe it is directed to the Judge of Aſſiſe, where it ought to be to the Chancellor, and he to command the Judge of Aſſiſe; and Precedents were ordered to be ſearched, and two found; one 7 *Car.* 1. directed to the Chancellor and Proceedings thereupon, and Judgment affirmed; the other 19 *Car.* 2. directed to the Judge, but no proceedings thereupon appearing in the Record, the Court had little regard to it: But in Truth there were Proceedings thereupon, for I myſelf was a Counſel in the Cauſe, and aſſigned Error *ore tenus*, which being over-ruled by *Hale* then Chief Juſtice, the Plaintiff in Error being this ſame *Leaver*, in a Conviction of Barretry as this is, agreed with the Proſecutor, and obtained a Pardon, by which means it happened, that none of the Proceedings were entered upon Record. But in that Caſe no Exception was taken to the Writ. A ſecond Exception to the Writ was, that in the Style of the King, *Carolus ſecundus, &c. Scotiæ* was omitted; and for this Cauſe the Writ was quaſhed, and *Leaver* brought a new Writ of Error directed to the Chancellor, and no Writ *quod coram vobis reſidet*, for it was held the Record was not removed by the firſt Writ.

Scotiæ omitted in the Style of the King.

Liſle againſt *Gray.*

Covenant to ſtand ſeiſed to *A.* for Life; Remainder to his 2d, 3d, and 4th Sons in Tail Male, and to all and every the Heirs Males of the Body of *A.* Whether *A.* has an Eſtate for in Tail? S. C. Raym. 278, 302, 315. 2 Sho. pl. 3. 2 Jon. 114. Vid. ante 9, 76.

EJECTMENT of Lands in *Northumberland*; and in a Special Verdict upon *Non Culp.* the Caſe was: One ſeiſed of the Lands in Queſtion covenanted to ſtand ſeiſed to the uſe of himſelf for Life, the Remainder

der to *Edward* his firſt Son for Life, the Remainder to the firſt Son of *Edward* in Tail Male, the Remainder to the ſecond, third, and fourth Sons of *Edward* in Tail Male, *and ſo to all and every other the Heirs Males of the Body of* Edward *reſpectively and ſucceſſively, and to the Heirs Males of their Bodies, according to their Seniority of Birth, the Remainder to the Leſſor of the Plaintiff for Life,* * *the Remainder to his firſt Son in Tail Male, and ſo to the 1ſt, 2d, 3d, and 4th Son in Tail Male, and ſo to all and every other the Heirs Male of the Body of the Leſſor ſeverally and reſpectively, according to their Seniority of Birth.* The Covenantor died; *Edward* ſuffered a Common Recovery, and dies without Iſſue Male; and if the Leſſor was barred by the Recovery? was the Queſtion; which reſts entirely upon the Words of the Limitation after the Limitations to the four Sons of *Edward, viz.* and *ſo to all and every the Heirs Male of the Body of* Edward; whether by theſe Words *Edward* took an Eſtate Tail for Default of the Iſſue of his four Sons? Or, whether he was only Tenant for Life, and the Words, and *ſo to all and every the Heirs Male of the Body of* Edward ſhall be taken as if it had been *to all and every other Sons of* Edward? And 'twas argued for the Plaintiff, that *Edward* took only an Eſtate for Life. Firſt; by the Words, *and ſo to the Heirs Male of the Bodies of thoſe Heirs*, it appears, that the Heirs Male are to take by Purchaſe; for otherwiſe theſe Words and *to the Heirs male of their bodies* need not have been added; for if they take by Purchaſe and *ſucceſſively*, then have the Words the ſame ſenſe as *all and every Son and Sons.* 2. *And ſo to all and every other the Heirs Males, &c.* (How muſt that be?) *So as the Heirs Male, ſcil. the Sons*, took before. 3. Tranſlate the Word *ſo* in *Latin, eodem modo as the four firſt Sons took*; as was done in *Beresford's* Caſe, to ſerve the Intent of the Parties, and to make the conveyance coherent. 4. Not only the precedent, but alſo the ſubſequent Limitations ſhew, his Intent was to ſettle it to the Leſſor and his four Sons in Tail Male, *and ſo to all and every the Heirs Male of the Sons*, &c. which would be in vain, if *Edward* ſhall have ſuch an Eſtate as will enable him by Common Recovery to defeat all the reſt. 5. Here is a *Proviſo*, that if *Edward* die without Heirs Male of his Body, he may charge the Eſtate with Portions for his

* P. 224.

Daughters, which were needleſs if *Edward* hath an Eſtate Tail, for then he may do it without ſuch *Proviſo*. But 'tis proper to add it to an Eſtate for Life, which ſhews alſo his Intent, that *Edward* ſhould have but an Eſtate for Life. On the other ſide it was ſaid, that in all Caſes when the Anceſtor takes an Eſtate of Freehold, a Limitation afterwards to his Heirs, or the Heirs Male of his Body, veſts the Inheritance in himſelf, *Co.* * *Litt.* 22. *b* and 1 *Co. Shellie's* Caſe. *Curia, Edward* hath only an Eſtate for Life by the manifeſt Intent of the Conveyance, which ought to be purſued where by any means it can; and therefore they, as was done in *Beresford's* Caſe, would tranſlate the Word *ſo*, *eodem modo*, as in *Beresford's* Caſe they tranſlated the Words *to the Heirs Male of* Aden, in this manner, *ſc. hæredibus muſculis de* Aden or *ex* Aden: to ſupply the Words *de corpore*, and to make good the Intent of the Donor in that Conveyance; and ſo they gave Judgment for the Plaintiff; upon which a Writ of *Error* was brought, and upon the firſt Argument the Court of *Exchequer-Chamber* inclined to affirm the Judgment: But before it was affirmed or reverſed, the Suit abated *per mortem*. And afterwards a new Ejectment was brought, *ſed quid inde venit neſcio*. *Levinz* for the Plaintiff, *Liſborn* for the Defendant.

* P. 225

Coltman againſt *Senhouſe*.

In an Indenture of mutual Covenants between Mother and Son, he Covenants that if he dies without Iſſue, he gives and grants the the Land to her, &c. this raiſes a Uſe to the Mother. S. C. 2 Show. p. 7. 2 Jon. 105. Nelſ. Lutw. 213.

EJECTMENT of Lands in *Cumberland*, and upon *Non Culp* and Special Verdict, the Caſe was; *Dalton* ſeiſed in Fee, died ſeiſed, leaving *Henry* his Son and Heir and one Daughter, to whom he gave 100*l.* for a Portion, the Wife of *Dalton* entered, and paid the Portion during the Minority of the Daughter, and after married the Defendant, and after *Henry* came of Age; and then by Indenture between *Senhouſe* and his Wife on the one Part, and *Henry* on the other Part, reciting this whole Matter, *Senhouſe* and his Wife for the Advancement of *Henry*, and for the Love his Mother had for him and for ſettling the Lands to him quit of all Claims for Jointure, Dower or otherwiſe, *Senhouſe* and his Wife covenanted, granted and aliened the Lands to

* See poſt. pag. 3 Lev. 370. & ante, 213.

to *Henry*, from the Day of Date, and that *Henry* ſhould enjoy the Lands during the Life of his Mother. Alſo he covenanted that his Mother ſhould enjoy there Cattlegates for ten Oxen or Cows. And that he ſhould pay all Taxes, and 13*l. per annum* to his Mother during her Life, and divers other Covenants and Agreements were betwixt them. And then towards the End of the Deed came this Covenant upon which the Action is brought, *ſc. Henry* covenants that if he die without * Iſſue. *He does give and grant the Lands in Queſtion to her and her Heirs*, and after he died without Iſſue, and his Siſter being his Heir brought the Ejectment; and whether this laſt Covenant and Grant ſhall amount to a Covenant to ſtand ſeiſed, and ſhall convey the Eſtate to the Mother? was the Queſtion. For the Plaintiff it was argued that it ſhould not, 1. Becauſe the Conſideration is for the Advancement of the Son, and the Affection of his Mother to him, and there is no appearance of any Intention to raiſe a Uſe to the Mother. 2. The Scope of the Deed ſeems to be an Agreement to compoſe Matters between the Son and his Mother, who entered and took the Profits of his Eſtate, and paid a Portion to the Siſter. And *Foſter & Foſter's* Caſe was cited, wherein was ſuch an Agreement as this is by Articles, and yet no Uſe ariſes, tho' it contained the ſame Words, *does give, grant*, &c. and *Pitfield* and *Piers's* Caſe, 2 *Roll.* 789. 3. The Mother entered, and it might be by Diſſeiſin; for it does not appear how ſhe entered, neither does it appear that the Son re-entered, and then his Covenant cannot raiſe a Uſe out of an Eſtate whereof he was not in Poſſeſſion. 4. The Indenture ſeems to be only mutual Covenants and Agreements betwixt them; and by the Covenant that *Henry* ſhould enjoy for the Life of the Wife, no Uſe can ariſe to *Henry*, becauſe it is her Covenant, and ſhe was a *Feme-covert*, and all on her Part reſts only in the Covenant to bind the Huſband, and ſo on the Part of *Henry*, his Covenant reſts only in Covenant that his Mother ſhall have the Eſtate if he die without Iſſue. For the Defendant it was ſaid, That where the Intent appears to paſs an Eſtate, but the Conveyance is defective, it ſhall be ſupplied and made good by way of Uſe to fulfil that Intent; and that here was a manifeſt Intent

* P. 226

Covenants to raiſe Uſes. 1 Lev. 30, 55, 171. 1 Mod. 175 Cart. 137. 3 Lev. 9. 76, 224. 2 Lev. 2. 76, 224. 3 Lev. 126, 370, 372, 306, 2 Roll. Ab. 786, 787, 788, 789. 2 Jo. 99, 100, 105. 2 Vent. 149, 260, 266. 2 Vent. 311, 312, 318. Poll. 459, 523, 537. 1 Vent. 334, 372, 373. Vide Mar. 50. 1 Sid. 25. 1 Lev. 36. 3 Mod. 247. 2 Mod. 251.

tent that his Mother ſhould have the Eſtate if he died without Iſſue, 2 *Roll.* 789. *Tibb* and *Popkthwayt's* Caſe, and *Croſſing* and *Scudamore's* Caſe, *ante* in this Court, *ſc. Paſch.* 23 *Car.* 2. *B. rot.* 871. and *Pybus* and *Mitford's* Caſe, *Trin.* 24 *Car.* 2. *B. R. rot.* 318. *Curia.* We have gone as far already as is convenient for us to do in making good barbarous Conveyances, it is not fit for us to go farther than we have done already; and inclined againſt the Defendant, *ſed adjournatur. Poſtea Mich.* 30. it was argued again, and the Court took Time to deliver their Opinions, and did not, but adjourned it till *Paſc.* 31. and then the Court upon Conſideration, being agreed, gave Judgment for the Defendant, * that a Uſe was well raiſed to the Wife by this Covenant being the Intent of the Parties. And they ſaid that *Wylde* Juſtice, now dead, was of the ſame Opinion. *Levinz* Counſellor for the Plaintiff, *Saunders* for the Defendant.

* P 227

Ante 225.

Gilmore againſt *Shuter.*

Promiſe of a Marriage-Portion without writing made before the Statute of *Frauds* and ſued after. 8. C. 1 Vent. 330. 2 Ton. 108. 2 Show. pl. 9.

ASSUMPSIT upon a Promiſe for Payment of a *Mariage-Portion* made before the late Statute of *Frauds* and *Perjuries*, and a Special Verdict was found before *Rainsford* Chief Juſtice, at *Guild-hall:* And it was reſolved by the whole Court, That whereas the Statute is, *That after the* 24*th of* June, 1677, *no Action ſhall be brought upon any Promiſe in Conſideration of Mariage without a Writing teſtifying the ſame*; and this Action is brought after the 24 *June* 1677, yet being grounded upon a Promiſe made before the 24 of *June* 1677, it is good without any Writing thereof; and that the Statute extends only to Promiſes made after the 24 of *June* 1677. for which Actions are brought after the 24 of *June* 1677, and no other; for it was not the Intent of the Parliament to defeat all Promiſes made before the Act.

Chapman

Chapman againſt *Fothergill*

ASSUMPSIT in Conſideration the Plaintiff would conſent, and would not hinder the Defendant to marry ſuch a woman, in whom the Plaintiff had ſome Power of Perſuaſion, the Defendant promiſed to pay him 20*l.* and ſays that he conſented and hindered not the Marriage, and that the Defendant married the ſaid Woman, and had not paid the 20*l.* Upon general Demurrer, Judgment was given for the Defendant, becauſe it is not ſhewed in the Declaration where, or in what Place the Defendant did conſent, and this is not a mere Negative; *not to hinder*, as was objected by the Plaintiff, but Affirmative alſo; to conſent, and not to hinder.

Conſideration that he would conſent, and not hinder a Marriage, and does not ſay where he conſented and did not hinder.

* *Hall*, &c. againſt *Huffam*.

* P. 228.

ASSUMPSIT by *Hall* and *George Wood*, and his Wife Executrix of *John Whitley*, and declares, That by the Law of Merchants there is no Survivorſhip; and that *Holt* and *Wood* Joint merchants were poſſeſſed of 40 Ounces of Muſk, and ſold it to the Defendant at ſo much *per* Ounce, as they ſhould ſell the reſt of their Muſk; and that they ſold the reſt at ſuch a Price, and that the Defendant had not paid; and declares alſo of another Promiſe made to the Plaintiff after the Death of the Teſtator. Upon *non Aſſumpſit*, and Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That the Plaintiffs ought not to join, but ſhould ſever for their Moieties; for the Action brought by the Executor ought to be in the *detinet tantum*, and by the Survivor in the *debet & detinet*. 2*dly*, The Executor himſelf ought not to join two Promiſes in one Action, the one made to the Teſtator, the other to himſelf. *Sed non allocatur*; for the Judgment for an Executor is all one as for any other Plaintiff, and whatever is recovered in ſuch Caſe will be Aſſets in the Hands of the *Executor*: but a Man cannot ſue an Executor and another jointly; for the one is to be charged *de bonis Teſtatoris*, the other *de bonis propriis*; and Judgment was given for the Plaintiff.

Surviving Joint-Merchant, and the Executor of his Companion, join in an Action. Ante 110, 111, 188. 3 Keb. 737. 798.

Executor may ſue upon two Promiſes, the one to himſelf, the other to his Teſtator, but cannot be ſued upon two Promiſes, one by himſelf, the other by his Teſtator. Vide 1 Sid. 224, 266, 1 Lev. 250. 3 Lev. 74.

Term.

Term. Sanct. Mich.

ANNO

30 Car. II. in Banco Regis.

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* *Doughty* againſt *Mills.*

Juſtification 10 *October* for taking one by Virtue of a Warrant of the Seſſions the 9 *October*, not averring the Seſſions then continued, is naught. 1 Salk. 53. 1 Term Rep. 645. 2 Burr. 899.

TRESPASS and Falſe Impriſonment; the Defendant juſtified that a General Quarter-Seſſions of the Peace was held 9 *October* 27 *Car.* 2. and that the Juſtices made a Warrant to him to bring the Defendant to the Seſſions, and that he the 10 *October*, *virtute warranti præd'* took the Defendant to bring him to the Seſſions, and detained him for a quarter of an Hour, and then the Defendant reſcued himſelf. The Plaintiff demurred and had Judgment; for the Bar is ill in not averring that the Seſſions continued the 10 of *October*, for otherwiſe it ſhall not be intended; and his ſaying that he took him *virtute warranti præd'* will not ſupply it, as in *Bayton's* Caſe, 3 *C.* 44. *b. virtute warranti præd'* ſupplies, that it was in Writing, and that it was betwixt the *Teſte* and Return of the Writ. *Tamen quære.*

Strode againſt *Hunt.*

* P. 230.

No Value of the Soil taken in the *Continuando.*

TRESPASS *quare* 1 *Maii anno* 29 *Car.* 2. *Clauſum fregit & intravit & fodit terram & aſportavit vigint' carectat' terr' & ſoli valor' quadraginta ſolidor', continuando tranſgreſſionem præd' quoad foſſionem caption' & aſportationem*

tationem terr' & ſoli' præd' a præd' 1 die Maii uſque 1 diem Junii tunc prox' ſequent' ad Dam' 30*l.* Judgment for the Plaintiff upon Demurrer, and a Writ of Enquiry of Damages, and intire Damages, and adjudged ill, becauſe there is no Value alledged for the *Soil* carried during the Time of the *Continuando*, according to the Judgment *Paſch. prox' præterit' inter Howell* and *Lagden*. And yet in *Howell's* Caſe it was not ſaid *oſtrea prædict'*, being for taking 100 Buſhels of Oyſters, *continuando tranſgreſſionem prædict' quoad* the taking of the *Oyſters*, but does not ſay *Oſtrea prædict'*. *Et hic eſt ſoli prædict'*.

Vide Ante 20, 156.

Jackſon againſt *Nele.*

ASSUMPSIT in *Windſor-Court* for Meat, Drink, *&c. apud Maidenhead infra Juriſdictionem Curiæ*; and upon *Non Aſſumpſit* the evidence there given was of *Meat, Drink and a Promiſe apud Henly*, which is *extra Juriſdictionem*; for which the Defendant offered to demur upon the Evidence, but the Steward would not admit thereof, whereupon Verdict and Judgment for the Plaintiff; and now upon the whole Matter a Prohibition was prayed, but denied; for it is not grantable after Judgment there. *Quære* in this Caſe, for the Party hath no other Remedy, he hath done all that he could to prevent Judgment; and at this Rate they may give Judgment in Inferior Courts after Verdict before the Defendant can be heard time enough to have a Prohibition, and ſo tortiouſly enlarge their Juriſdiction.

No Prohibition to inferior Courts after Judgment. Vide 1 Lev. 50, 69, 96, 104, 137, 153, 208, 289. ante, 887. Ante, 87.

* *Gamon* againſt *Vernon.*

* P. 231

DEBT for Rent; The Caſe upon the Declaration after Verdict was, Leſſee aſſigned the Moiety of the Land for the whole Term, the Leſſor brought Debt againſt the Aſſignee for the Moiety of the Rent: And it was moved in Arreſt of Judgment, That both the Privity of Eſtate and Contract, in this Caſe, remain entirely in the Leſſee, and by Conſequence the Moiety of the Aſſignee not chargeable. But *per totam Curiam*, the Aſſignee having the entire Eſtate in one Moiety of the

Debt by the Leſſee againſt an Aſſignee of a Moiety, for the Moiety of the Rent. S.C 2 Jon. 164. Vide 2 Sand. 181, 182, 303. 1 Lev. 308. 1 Sid. 401. 3 Lev. 296. Ray 162.

Pop. 220. 3 Co. 22, 24. 2 Danv. 484, 485. 2 Bac. Abr. 18. 22. 443. 2 Com. Dig. 648 5 Com. Dig. 201.

the Land, he hath the Privity of Eſtate ſufficient to be charged by the Leſſor for the Moiety of the Rent if he will; and Judgment was given for the Plaintiff.

The King againſt Mayor, Citizens, and Common Council of *London.*

Members of Corporation Witneſſes for the Corporation. Bull. N. P. 290

INFORMATION in Nature of *Quo Warranto* for taking ½*d. per* Chaldron for all Sea-Coals brought to *London*, the Defendants preſcribe for the Duty, and Iſſue was taken upon the Preſcription, and tried at Bar. The Defendants produce ſeveral Citizens, Freemen of *London*, to prove the Preſcription; and it was objected they ought not to be Witneſſes, *quia in proprio Caſu. Sed per Curiam*, it appearing that the Mayor and Sheriffs have the whole Profit of this Toll, tho' they have it for the Benefit of the whole Corporation, of which all the Citizens and Freemen are Members; yet theſe having no particular Profit to themſelves, were ſworn as Witneſſes; for it cannot be preſumed that for an Advantage ſo ſmall and ſo remote, they would be partial and perjure themſelves; and the Jury found for the Defendants. And *Scroggs*, Chief Juſtice, ſaid, That it ought not to be a general Rule, that Members of Corporations ſhall be admitted or denied to be Witneſſes in Actions for or againſt their Corporations: But every Caſe ſtands upon its own particular Circumſtances; *viz.* whether the Intereſt be ſo conſiderable as by Preſumption to produce Partiality or not.

* P. 232.

* *James* againſt *Richardſon.*

Deviſe to the Heir of *Robert Durdant* now living, who then had a Son *George*, a good deviſe to *George*. S. C. 2 Jon. 99 100.

EJECTMENT, and upon *Non Culp.* and Special Verdict, the Caſe was, *Weekes* ſeiſed in Fee, deviſed the Lands to *Higden* and his Heirs, for the Life of *Robert Durdant* in Truſt for *Robert Durdant*, and after the Death of *Robert Durdant*, to the Heirs males of *Robert Durdant* now living, and ſuch Heirs males or females

Ray. 330, 331. 2 Vent. 311, 1 Vent, 334. 335. 3 Keb. 832. 2 Show, 2 Dan 515. 516. Vide Hob. 29, 33, Ato. 860. 2 Leon. 70. Raym. 82. 2 Jo. 112. 2 Mod. 291. 1 Heb. 567, 752, 840. 3 Keb. 111, 145, 296, &c. 1 Lev. 59, 60.

females as he afterwards ſhall have of his Body. *Robert* at the Time of the Deviſe had a Son called *George*; and whether this was a Remainder executed in *George* by the Name of *Heir male* of his Father? was the Queſtion; for it was objected, *nemo eſt hæres viventis*, and *Robert* being then living, *George* could not take during his Life by the Name of *Heir*: But after divers Arguments it was adjudged, that the Remainder was veſted and executed in *George*, and not a contingent Remainder, and ſo deſtroyed by the Fine of *Higden* in the Life of *Robert*; for the Teſtator takes Notice that *Robert* was alive, and then deviſing to Heirs now living, *George* is the Perſon he intended by the Word *Heir*, he is Heir apparent in Law, and in Common parlance is called Heir, and *now living*, refers to all; *ſc.* Heirs males now living, although *Robert Durdant* are the Words precedent; for he took Notice before that he was living, and therefore a Tautology to refer them to him, but proper to refer them to *George*, who was named before, and perhaps his Name not remembered by the Deviſor, and therefore added theſe Words *now living*, to demonſtrate what Perſon he intended; and yet he ſhall take in Fee-ſimple, and not an Eſtate for Life only, as was objected, it muſt be if the Words were only added to denote the Perſon; for by *Heirs* is included all Heirs of Heirs, as a Remainder limited to the Right Heirs of *J. S.* includes all Heirs of Heirs, without ſaying to the Right Heirs of *J. S.* and their Heirs: Whereupon a Writ of Error was brought in the *Exchequer-Chamber*, and there this Judgment was reverſed upon the Point in Law; and upon that another Writ of Error was brought in the *Houſe of Lords*: and the Judgment in the Exchequer-Chamber was reverſed, and the Judgment in the *King's Bench* affirmed. And afterwards a new Ejectment was brought upon the Death of *George* againſt * his Heir to try this Point again, whether *George* took only an Eſtate for Life, or in Fee? And the Matter was found Specially again, and Judgment given in *B. R.* for the Heir upon a new Hearing of this Matter; and upon this a Writ of Error was alſo brought, and the Judgment in *B. R.* affirmed, whereupon another Writ of Error was brought in the Houſe of Lords, and the Judgment affirmed.

Relation not to the next Antecedent, where the Senſe of the Word is otherwiſe. 2 Dan. 515, 516.

* P. 233

Newton

Newton and his Wife againſt *Maſters.*

She is a Strumpet and a Bawd, and kept a Bawdy-houſe. Vid. ante 274

CASE by Baron and Feme for ſaying of the Wife, *She is a Strumpet and a Bawd, and kept a Bawdy-Houſe:* After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that none of theſe Words are actionable ſave the laſt, *ſcil. ſhe kept a Bawdy-houſe*, and they are ſpoke in the Preter-tenſe, and ſo it may be intended, that ſhe kept a *Bawdy-houſe* before the General Pardon. But *per Curiam*; The Scandal remains, and it ſhall not be intended of keeping a *Bawdy-houſe* before the Pardon, unleſs it fully appears it was the Meaning of the Party, and that he ſo intended.

Wetherhead againſt *Armitage.*

Of a School-Miſtreſs; *ſhe is much a Man as I, ſhe got a Woman with Child, ſhe is an Hermaphrodite*, not actionable without Special Damage. S. C. 2 Show. pl. 11. Vid. 1 Sal. 16.

CASE by the Plaintiff, a Woman, and declares, that ſhe *per diverſos Annos* (not ſaying *ultimos Elapſos*) was *ſkilled in Dancing, and taught* Young Women to dance, whereby ſhe gained a Livelihood; and the Defendant to injure her ſaid, *She is as much a Man as I am, ſhe got* J. S. *with Child, ſhe is an Hermaphrodite*; by which ſhe loſt divers Scholars but does not mention any in particular. Verdict for the Plaintiff; but after divers Motions *pro & con.* Judgment ſtaid; for *Hermaphrodite* is not actionable, nor is it any Scandal to her Profeſſion; for Young Women are taught to dance more frequently by Men than Women; and no Special Damages are laid. And therefore the Court held the Words not actionable in themſelves, without Regard to the Exception of its being *diverſos annos* (omitting *ultimos Elapſos.*) *Holt jun.* for the Plaintiff; *Levinz* for the Defendant.

Knight

* *Knight* againſt *Hooper*.

REPLEVIN, and avows for Rent upon a Leaſe rendering Rent, and a Grant of the Reverſion by the Leſſor to the Avowant; but pleads no Attornment upon the Grant of the Reverſion. Iſſue, *riens arrere*, and Verdict for the Avowant; and it was moved in Arreſt of Judgment, that the Avowant hath ſhewn no Title for Want of Attornment: *Sed per Cur'*. *Riens arrere* hath admitted a Title in the Avowant; at leaſt it is cured by Verdict, for the Jury could not find any Rent Arrear to him, if he had no Title. *Quære* of the firſt Reaſon, for *riens arrere* is the general Iſſue.

Avows for Rent by Grant of the Reverſion, and ſhews no Attornment. Cured by Verdict upon Iſſue *riens arrere* for the Avowant. Vide 6 Mod. 113. Hob. 54.

Aſſer againſt *Finch*.

TRESPASS for entering his Cloſe, and ſpoiling his Graſs, the Defendant juſtifies for a Way there; the Plaintiff replies *extra viam*, and Iſſue thereupon, and Verdict for the Plaintiff, and whether the Plaintiff ſhould have full Coſts, or no more Coſts than Damages upon the new Statute? was the Queſtion: For it was ſaid, no Title came in Queſtion upon the Trial, for the Way is admitted, and the Iſſue is now only, whether he was guilty *extra viam*? *Sed per Cur'*. The Plaintiff ſhall have full Coſts; for 1ſt, there was a Title to the Way in Queſtion upon Record, and ſo the Caſe is out of the Intent of the Statute. 2dly, Upon this Iſſue *extra viam*, a Title to the Way is in Queſtion; *ſcil.* of what Extent the Way is? Whether 10 or 20 Feet in Breadth, *&c.*? All which came in Queſtion upon the Trial. Otherwiſe perhaps, if the Extent and Place where the Way lies had been agreed in the Pleadings. But as it is, the Plaintiff had Judgment and full Coſts by the Rule and Direction of the Court.

Treſpaſs, and juſtifies for a Way; Iſſue *extra viam*: Full Coſts. S. C. Sho. pl. 19. Ante 124. 5 Mod. 74

Adams

* P. 235

* *Adams* againſt *Statham.*

Award that one ſhould pay the other ſo much for Sums received out of the Eſtate of *W.* a mere Stranger.
S. C. 1 Danv. 485.
2 Show. pl. 47.
Vide 1 Lev. 58.
2 Saund. 292.
2 Keb. 736.
3 Lev. 188.
Vide ante 3, 68.
1 Salk. 74, &c.
3 Cro. 4, 758.
1 Roll. 247, 259.

ASSUMPSIT, Whereas Differences had been between the Plaintiff and Defendant (but does not ſay touching what matter they were in Difference) they ſubmitted to the Award of *J. S.* who did award *de & ſuper Præmiſſis*, That the Defendant ſhould pay the Plaintiff 30*l.* in Satisfaction of all Sums due to him out of the Eſtate of one *Woolly*. After Verdict for the Plaintiff, Judgment was ſtaid; but at laſt after divers Motions this and other Terms was entered for the Defendant, becauſe it does not appear that the Defendant is Executor, Adminiſtrator or Truſtee for *Woolly*; it does not appear he had any Thing of *Woolly's*, or that he ſubmitted on behalf of him, and ſo no Conſideration why he ſhould be charged for the Eſtate of *Woolly*.

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* P. 236

* Term. Sanct. Hill.

ANNO

30 & 31 Car. II. in Banco Regis.

Enfield againſt *Hills.*

Freemen admitted to be Witneſſes for the Corporation.
See p. 231.
S. C. 2 Jon. 115.

CASE, Whereas the Plaintiff was an *Alderman* of *Canterbury*, and put out of his Place, and ſued a *Mandamus* to be reſtored; the Defendant *falſo*, &c. procured a Return to be made in the Name of the *Mayor*, *Aldermen*, and *Commonalty of Canterbury*, and ſet forth the whole Return *in hæc verba*, and the Falſity of it, by

by which he loſt his place. Upon *Non Culp.* pleaded, and a Trial at Bar, the Defendant produced ſeven Freemen of *Canterbury*, as Witneſſes for him to prove the Truth of the Return; to whom it was objected, That they being Freemen of *Canterbury* ought not to be received as Witneſſes; producing a By-law there made, by which their Return was ordered to be made, and that the Charges inſuing ſhould be borne by the Corporation. To which the Counſel for the Defendant anſwered, and ſhewed a Releaſe from the Defendant to the *Mayor*, *Aldermen* and *Commonalty*, and all others, the Freemen of *Canterbury*, of all Advantages, Contributions and Demands which he might have againſt them by Virtue of this By-law, or any other Order, *aut alio modo quocunque*. And yet by the Opinion of *Rainsford* and *Twyſden*, *contra Jones*, theſe three Judges being only then in Court, the ſeven Witneſſes were not allowed to give Evidence, and the Jury gave their Verdict for the Plaintiff, and 300*l.* Damages. Hereupon the Defendant's Counſel prayed the Court to ſign a Bill of * Exceptions for not admitting the Witneſſes, which they agreed to do accordingly, *and before Judgment it was drawn, ſigned and ſealed by them.* And now it was moved in Arreſt of Judgment, *upon the Bill of Exceptions, and divers Points ſhewed and argued.* And for the Defendant 'twas ſaid, 1ſt. That a Bill of Exceptions lies upon a Trial at Bar as well as a Trial by *Niſi prius*, and that upon Stat. of *Weſtmin.* 2. 31. and for authorities were cited 27 *H.* 8. 24, 25. upon a Trial by *Niſi prius*, 2 E. 4. 66. upon a Trial at Bar in *Com. Banc.* and alſo 21 E. 4. upon a Trial at Bar in *C. B.* And *Co.* 2. *Inſt.* 427. upon the Words of the Stat. *Et ſi Dominus Rex venire faciat coram illo*, who ſays it is to be intended of a Writ of Error, which does not lie *in Banco Regis* upon a Judgment in the ſame Court, therefore he ſuppoſes that a Bill of Exceptions would not lie upon a Trial by *Niſi prius* out of this Court, for there the Judgment and Record is in this very Court, which would render the Statute of little or no Effect; for by the ſame Reaſon it will not extend to Trials in the Exchequer, for Error lies not in *B. R.* upon their Judgments. But theſe Words *ſi Venire facias* are to be underſtood that the Record is brought there by Writ of Error; not to exclude Caſes where the Record is already there; nor where it can never come there, but goes

Releaſe of all Demands concerning the claim, &c.

* P. 237

Bill of Exceptions upon a Trial at Bar, B. R.

Motion in Arreſt of Judgment upon a Bill of Exceptions.

goes before other Juſtices by Writ of Error. 2dly, It was ſaid for the Defendant, That of this Bill of Exceptions advantage may be taken as well in Arreſt of Judgment, as upon a Writ of Error; and in the 27 *H.* 8. 24, 25. 'twas ſo done. 3 *H.* 4. 14. *b. it is as well to prevent Judgment as to reverſe it.* 3dly, Here needs no *Scire facias ad cognoſcendum ſigill'*, becauſe the Judges are of the ſame Court where the Bill was ſigned, either to confeſs or deny their Seals; and though it happens that two of the three Judges are removed, *ſc. Rainsford* and *Twyſden*, yet it is ſufficient that *Jones* continues; for by the Words of the Statute one Judge is enough to ſeal the Bill, *& ſi forte unus Juſticiarior' non vult apponere ſigillum apponat alter.* And if one be ſufficient to Seal, one is ſufficient to Acknowledge. 4thly, The Refuſal of the Witneſſes was Error; for be it as it will in other reſpects by the Releaſe of the Defendant, all the Advantage he can have againſt the Citizens for his Charges upon the By-law is diſcharged. And the whole Court now held that theſe Witneſſes ſhould have been admitted. * 5thly, The Declaration itſelf is naught; for it does not ſhew what was done upon the *Return*, perhaps it may yet be adjudged ill, and then the Plaintiff ſhall be reſtored, and yet ſhall have 300*l.* for the loſs of his Place; he ought to have ſtaid till Judgment had been entered upon the Return, and thereupon have declared; otherwiſe it is like an Action upon the Caſe for indicting a Man of Felony, which lies not without ſhewing he was acquitted, or that the Grand Jury found the Bill *Ignoramus*. And of this Opinion was *Scroggs*, Ch. Juſt. to which the reſt inclined. For the Defendant 'twas anſwered, That a Bill of Exceptions lies not upon a Trial in this Court, whether it be at the Bar here, or by *Niſi prius* out of this Court, and that upon the Words of the Stat. *ſi venire faciat Dominus Rex recordum coram illo, Co.* 2 *Inſt.* 427. But the Court ſeemed to incline that a Bill of Exceptions lay as well upon Trials in this as in any other Court. *Et nota* afterwards, in or about the Year 1693. upon a Trial at Bar between the Duke of *Grafton*, and the Lord Chief Juſtice *Holt*, for the *Office de Chief Prothonotary de Banco Regis*, the Court agreed to ſign a Bill of Exceptions. But afterwards, for apparent Falſities there inſerted, they refuſed to ſeal it, which was complained of to the

A Scire facias ad cognoſcend. **where neceſſary.**

All but one of the Judges removed after the Bill of Exceptions.

* P. 238

Caſe for Falſe Return of a *Mandamus* lies not unleſs Judgment be given upon the Return.

Houſe

Houſe of Lords, where the Falſities were examined. To the 2d Point it was argued for the Plaintiff, That a Bill of Exceptions is not to be uſed in Arreſt of Judgment, but only in a Writ of Error, and they produced and cited many precedents where it had been uſed upon a Writ of Error, which the Court ſaid were good Proofs that it might be uſed upon a Writ of Error: but they did not prove that it could not be made uſe of by Motion in Arreſt of Judgment; *however they gave no poſitive Opinion as to this Point.* 2dly. It was ſaid for the Plaintiff, That no Uſe could be made of the Bill here, becauſe it is not entered upon the Record, but only brought into Court under the Seals of the Juſtices. But to this the Court anſwered, It appears by the Stat. that it is not always entered upon Record, for the Stat. ſays, *ſi non inveniat in rotulis, &c.* then a *Scire facias* ſhall iſſue. Alſo it may be entered now if that be neceſſary: But the Bill not being entered, the Plaintiff's Counſel did not ſpeak to the Refuſal of the Witneſſes. But the whole Court declared, That the Witneſſes ſhould have been admitted, and the Refuſal is an injury to the Defendant, which will be a ſufficient Reaſon for the Court to grant a new Trial, come what will of the other Matters. And as to the Exception to the Declaration, *it was ſaid by the Plaintiff's Counſel, it is not uſual in the Crown Office to enter up Judgment in theſe Caſes, unleſs where Reſtitution is awarded. And the Plaintiff hath concluded his Declaration, *ſcil. whereby he loſt his Place*, which is a ſufficient Averment in ſuch Caſe, that the Return was adjudged ſufficient, ſo that he was not reſtored. But the whole Court held the contrary; and though the Clerks *ex officio* do not enter up Judgment upon the Return but where they make farther Benefit by iſſuing out Writs of Reſtitution; yet if Judgment was given upon the Sufficiency, the Plaintiff ſhould have procured it to be entered up to enable him to bring his Action: And the Court ſtrongly inclined that the Declaration was naught for this Cauſe; but they gave no Judgment at preſent, but gave the Plaintiff's Counſel farther Time to adviſe with his Client; for be the Law one Way or other, here is at leaſt ſufficient Grounds for a new Trial. Afterwards the Parties agreed, as I ſuppoſe, for I heard no more of the Caſe. *Holt, jun.* for the Plaintiff;

Bill of Exceptions need not be entered upon Record.

* P. 239

Judgment never entered upon the Return of a *Mandamus* but where Writs of Reſtitution iſſue.

Levinz for the Defendant in the Motion in Arreſt of Judgment.

Colborne againſt *Wright.*

Co-executor and Adminiſtrator during the Minority. S. C. 2 Jon. 119. Vid. 3 Leon. 143, 209. 4 Leon. 56, 212. Yelv. 130. 1 Brownl. 101. 5 Co. 27. 1 And. 117. 1 Mod. 47, 297. 1 Saund. 212. 2 Lev. 181, 299.

DEBT for Arrears of Rent as Executor, and alſo as Adminiſtrator *durante minore ætate* of his Co-executor, and declares, that the Teſtator made the Plaintiff and others his Executors, and that *J. D.* ſeiſed of a Rent of 20*l. per annum*, deviſed it to three Perſons in equal Parts in Common, and that all the three Deviſees levied a Fine of one Moiety thereof to the Wife of the Teſtator in Fee, and of the other Moiety to the Uſe of a Stranger in Fee, and that the Stranger granted his Moiety to the Wife of the Teſtator in Fee, that the Teſtator had Iſſue by her, and after the Wife died, whereby the Teſtator became ſeiſed of the whole by *Curteſy of England*, and that the Rent grew due to the Teſtator, who made him and the other Co-executors, and that he ſolely proved the Will, and Adminiſtration was granted to him during the Minority of the Co-executor, who is ſtill under Age. To this Declaration the Defendant demurred, and two Things were now inſiſted on for the Defendant: 1. That this being a Rent-Charge which is againſt Common Right, it cannot be divided only to make Tertenant ſubject * to ſeveral Diſtreſſes without his Conſent, and there is no Attornment, *Co. Lit.* 148. *a. aliter* of a Rent Service or ſuch things as are of common Right, *Hob.* 25. Grantee of a Rent gives Part thereof by Fine, the Tenant is not bound to attorn, therefore the Deviſe and the Fine to Uſes thus divided is not good. He agreed, that to a Deviſe or a Fine to Uſes there needs no Attornment; but the Deviſe or Fine in ſuch Caſe of Things not dividable can't be divided, but the Deviſe and the Fine itſelf are void. 2. Both the Executors ought to join in the Action, though only one of them prove the Will, and an Executor and Adminiſtrator to the ſame Perſon are inconſiſtent; for where there is an Executor, the Ordinary hath no Power to grant Adminiſtration. 9 *Co. Henſloe's* Caſe. *Yelv* 130. *Smith v. Smith*, and *Cunningham's*

* P. 240

Rent-Charge dividable by Fine or Deviſe.

Cunningham's Caſe lately adjudged in this Court. To which it was anſwered by the Counſel of the Plaintiff, and reſolved by the Court; 1. That by theſe Conveyances of Deviſe and Fine to Uſes, the Rent may be divided without the Aſſent or Attornment of the Party, becauſe his Aſſent or Attornment is not neceſſary to the Perfection of theſe Conveyances. 2. Where one of the Executors is an Infant, and cannot prove the Will, Adminiſtration *durante ſua minoritate* may be granted to the other, who muſt ſue ſolely, and it is not inconſiſtent to have Adminiſtration in ſuch Caſe, for it is not granted in this Caſe, as it is upon a dying Inteſtate; for here the Will is proved but only to enable him to ſue ſolely, becauſe the other is not capable of proving the Will, nor to join with him, and he cannot ſue ſolely; and cited *Hatton* and *Maſcall's* Caſe entered in this Court, *Mich.* 15 *Car.* 2. *B. R. Rot.* 703. the Roll whereof was brought into Court, and appeared to be ſo adjudged. But where both Executors are of full Age, though the Will be proved by one only, the Action muſt be brought in both their Names: So Judgment was given for the Plaintiff; *Holt junior* for the Plaintiff, *Levinz* for the Defendant.

Two Executors; one under Age, the other proves the Will, and hath Adminiſtration *durante minore, &c.* he may ſue ſolely. Vid. 1 Lev. 181, 299. *&c.* ante.

* *Greaterchy* againſt *Beardſly.*

* P. 241

PROHIBITION was prayed, upon a Suggeſtion, that Time out of Mind the Pariſhioners at their own Charge have built and repaired all the Seats of the Church, and *ratione inde* the Seats have Time out of Mind been diſpoſed of by the Churchwardens, and that now the Biſhop took upon him to diſpoſe of them. *Bigland* for the Plaintiff argued, that though generally the Ordinary hath the Diſpoſal of the Seats of the Church, yet it might be otherwiſe by Cuſtom, and cited 2 *Roll. Abr.* 288. *Tredenham's* Caſe. *Jones* Juſtice; Of common Right the Ordinary hath the diſpoſal of all Seats in the Church, and of common Right the Pariſhioners ought to repair them; *Co.* 2 *Inſt.* 489. Then what have the Pariſhioners done here to ouſt the Ordinary of his Juriſdiction? They have only ſaid that they have repaired the Seats at the Pariſh Charge,

Church-wardens preſcribe to diſpoſe the Seats of the Church, *ratione edificat' & reparation.* Antea 102, 186, Vid. 1 Sid. 88, 89, & 101. 1 Lev. 71. Noy. 104. 2 Jon. 3, 4, 202, 203. Raym. 52. Bridg. 4. Mo. 878. Hob. 69.

which is no more than their Duty, for which they have the Eaſement of ſitting in them, according to the Diſpoſal of the Ordinary; whereupon a Prohibition was denied by the whole Court, as it was before done *in Com. Banc.* in this very Caſe, where it was firſt moved.

College of Manchester againſt *Trafford.*

A Leaſe reciting a Leaſe which is not, and demiſes for 21 years, and ſo from 21 to 21 Years, *&c.* till 99 Years are ended, though no Number of 21 can center in 99, yet it ſhall be a Leaſe for 99 Years from the End of the firſt 21 Years.

ERROR of a Judgment at *Lancaſter*; where upon a ſpecial Verdict the Caſe was; the College in the Reign of Queen *Elizabeth*, reciting a Leaſe made by them in the Time of *Edw.* 6. demiſed to one *Trafford* for 21 Years, rendering Rent 21*l.* 16*s.* 4*d.* and *Habendum* from the End of the ſaid Term made in the Time of *Edw.* 6. and then follows a Condition of Re-entry for Non payment of the Rent, and after that a Covenant and Grant, that after the ſaid 21 Years ended he ſhould have the Land for other 21 Years, and ſo from 21 Years to 21 Years, till 99 Years paſt thence next enſuing ſhall be compleat and ended. And it was found there was no Leaſe made in the Time of *Edward* 6. and ſince the Date of the Leaſe made in the Time of Queen *Elizabeth* more than 99 Years are expired, * but that 99 Years, computing from the End of the Term for 21 Years, are not expired. And ſo the Queſtion was, whether the Leſſee ſhall have 99 Years only, reckoning as from the Date of his Leaſe made in the Time of *Elizabeth*, or 99 Years over and above the firſt 21 Years; for it was agreed, that although the number of 21 Years can never center in 99, yet this Term ſhall endure for 99 Years, which is a Term certain, and the odd Years ſhall be rejected according to *Baldwin's* Caſe, 2 *Co. Rep.* But the Point in Queſtion was, when the 99 Years ſhould commence? And at *Lancaſter* it was adjudged, that the Leſſee ſhould have 99 Years over and above the 21 Years, and the firſt 21 ſhould not be reckoned Part of the 99, and that by Reaſon of the Word *Thence*; for if it muſt be reckoned from the Making of the Leaſe in the Time of Queen *Elizabeth*, it ought to be *Hence*. But *Thence* is a Word that does not denote a preſent Time, but another Time, and then

* P. 242

1 Lev. 20, 77.

then *Thence* muſt refer to the End of the firſt 21 Years, becauſe there is no other Time to which it can refer; for the Jury have found, that there was no Leaſe in the Time of *Ed.* 6. whereunto the Defendant would have referred it, and ſo the Term not expired; and of this Opinion was the whole Court, and affirmed the Judgment, and ſo was the Court of Exchequer about the Year 1687, where the Term being then expired, the Plaintiff recovered for the Term. *Levinz* for the Plaintiff in both Courts. * P. 243

Denning againſt *Norris.*

ERROR of a Judgment in *Norwich* Court, aſſigned, that the Sheriff by whom the Judgment was given had not taken the *Oaths*, and ſubſcribed the *Declaration*, according to 13 *Car.* 2. *cap.* 1. The Defendant pleaded, that the Oaths and Declaration were not tendered to the Sheriff. The plaintiff demurred. And reſolved, this is not aſſignable contrary to the Record and Admittance of the Parties; for this is in Effect to ſay that he was not Sheriff, becauſe the Statute ſays upon Default *&c.* ſhall be void, contrary to *Hipſly* and *Tuck's* Caſe, *Paſch.* 27 *Car.* 2. *B. R. Rot.* 1620. *quod vide ante.* 2. The Court held clearly, that the Tender is traverſable; for though the Proviſo for Avoidance be *per ſe & abſolute*, yet it ſhall relate to the precedent and firſt Part of the Statute which appoints them to be tendered.

Judgment in an inferior Court not void *quia* the Judge did not take the Oaths. S. C. 2 Jon. 137. Vid. ante 184 contra.

Tender of an Oath is traverſable.

Strode againſt *Berager.*

ERROR of a Judgment upon an *Ejectment in Communi Banco*, wherein upon a Special Verdict the Caſe was; *Robert Berager* had Iſſue his firſt Son *William*, who had Iſſue the Wife of the Leſſor, and a ſecond Son *Robert*, which ſecond Son *Robert* had alſo a Son

Deviſe to *Robert* my Son; *Robert* the Son dies in the Life of the Teſtator, and having a Grandſon *Robert*, he republiſhes, ſaying, *Robert* my Grandſon ſhall have, *&c.* S. C. 1 Vent. 314. 1 Mod. 267. 3 Mod. 313 2 Jo. 135. Raym. 408. 2 Danv. 534, 10. 2 Show. pl. 49. Vide 1 Rol. Ab. 618. Cro. El. 532, 576, 557. 3 Leon. 18, 19. Ow. 24, 35. 1 And. 61, 306, Plow. 344, 345. b. 2 Leon. 92. 2 And. 134. Mo. 160. Hob. 29. 1 Roll. Ab. 829. Roll. Abr. 416. 4 Mod. 140. Swinb. 35. Stra. 25, 82. Gilb. on Dev. 91. Wentw. 35. Cowp. 158. Doug. 31, 36. 1 Term. Rep. 435. Powell on Dev. 657.

Son *Robert*, Grandſon to the firſt *Robert*. *Robert* the Grandfather deviſed the Lands in Queſtion in theſe Words, *I give my lands in* Tilling *to my Son* Robert *and his Heirs, and I give to my Grandſon* Robert 50l. *Alſo I give to my Great Grandaughter* 100l. *Robert* the ſecond Son died in the Life of his Father, afterwards *Robert* the Deviſor made a Codicil whereby he deviſed Part of thoſe Lands which he had deviſed to his Son *Robert*, to his Daughter *Judith*, and afterwards he made a Republication of his Will by Parol, without writing, and ſaid, Robert *my Grandſon ſhall have and take by my Will as* Robert *my Son ſhould have done*, and afterwards died; and the Queſtion was, Whether *Robert* the Grandſon, Defendant in the Ejectment, and likewiſe here, ſhould have the Land by Virtue of this Will and Republication, or to the Wife, Leſſor of the Plaintiff, Daughter and Heir of *William* the firſt Son? And it was adjudged *in Communi Banco*, by the Opinion of *North*, Chief Juſtice, *Atkyns* and *Wyndham*, contrary to the Opinion of *Scroggs*, that the Grandſon ſhould have it; and now it was argued that this Judgment was erroneous, 1ſt, Becauſe Grandſon and Son are different Names of Appellation, and denote different Perſons. 2dly, Land cannot paſs by Will unleſs the Will be in Writing. 3dly, The Deviſor takes Notice in the Will of the Difference betwixt *Son*, *Grandſon*, and *Great Grandſon*, and makes Deviſes to ſeveral Perſons by theſe ſeveral Names. 4thly, The Republication by Parol will not ſupply the Defect of this Will, which, being of Lands, ought to be in Writing. 5thly, The Republication itſelf takes Notice of the Difference of theſe Appellations, *ſcil.* *My Grandſon* * Robert *ſhall have*, &c. *as my Son* Robert *ſhould have had.* It was agreed that Republication might aid a Will, if there be Words in the Will capable of being aided, as the Lord *Cheney's* Caſe, a Deviſe to *William*, there are two *Williams*, it may be averred what *William* was meant, becauſe the Word *William* was in the Will; and 3 *Cro.* 493. *Buckford* and *Parnecote*, a Deviſe of all his Lands in *Aldworth*, and after the Will he purchaſes other Lands, and then republiſhes the Will, all the Lands ſhall paſs, for the Words in the Will are ſufficient for that Purpoſe. But here the Word *Grandſon* is wanting in the written Will. And this Caſe is all one with the Caſe of *Brett* and *Rigden*. *Plowd. Com.* and *Hartrop's* Caſe. 3 *Cro.* 243.

* P. 244

Vid. Cro. El. 423. 493. Moor 404. Gokb. 150, 151. 1 Rol. Abr. 618. 7, 8. Plow. 345. Mo. 353. Vide 2 Danv. 534. 9. & 531. pl. 1, 2. 3 Keb. 845.

And

And the Opinion of *Popham* and *Fenner* in *Fuller* and *Fuller's* Caſe, 3 *Cro.* 422, 423. is denied by the other Judges, *ſcil. Gawdy* and *Clench*, and the Caſe there was adjudged upon another Point. For the Defendant in Error, it was ſaid, That here was a good Foundation in the Words of the Will, and the Intention of them may be ſupplied by Matter *dehors*. That Grand is but an Addition to Son to diſtinguiſh the Son from the Grandſon, who were both alive at the Time the Will was made; but when the Son was dead, as he actually was at the Time of the Republication, the *Grandſon* might well enough be meant and underſtood by the Name *Son*: And if a Man hath no Sons but a *Grandſon* called *Robert*, and deviſe Lands to his Son *Robert*, the *Grandſon* ſhall take according to the Opinion of *Walmſly*, *Owen* 88. And here, though at the Time the Will was made the Deviſor had a Son *Robert* and a Grandſon *Robert*, yet at the Republication, which is a new making of a Will, he had only a Grandſon *Robert*, and therefore he ſhall take by the Name *Son*, ſo as the name of Baptiſm is rightly expreſſed, and there is no one elſe to take it. *Scroggs*, Chief Juſtice, continued his former Opinion, ſaying, He was never ſatisfied with the firſt Judgment, and that the Judgment ought to be reverſed. *Dolbin*, Juſtice, ſeemed *contra*, *cæteri nil dixerunt. Et adjournatur*; but after I was informed the Judgment was reverſed. But *Quære* here of, for I was not then preſent.

* *Howard* againſt *Wood*.

* P. 245

ASSUMPSIT for Money received for his Uſed and upon *Non Aſſumpſit*, and Special Verdict, the Caſe was, The *Queen* having granted to the Plaintiff Sir *Robert Howard* the Stewardſhip of the Honor of *Pomfret* for Years, *Habend'* from the End of a former Term, in which Stewardſhip were compriſed ſeveral Courts-

Aſſumpſit for Money received in an Office, to which the Defendant claimed Title. S. C. 2 Jo. 126, 127. 2 Mod. 260, 261. 1 Danv. 27. 2 Show. pl. 14.

A Grant for Years in Reverſion of a Court-Leet and Court-Baron, void for the firſt, good for the ſecond.
Vide ante 174. Poſt. 252. 2 Leon. 179. 2 Vent. 175. 3 Lev. 262. Ante, 174.

Courts-Leet as well as Courts-Baron, the firſt Term being ended, the Defendant by a Grant ſubſequent to that Grant made to the Plaintiff, held the Court, and received the Money, for which the Plaintiff brought his Action for the Fees. And upon Arguments at Bar, the Court was of Opinion that the Grant to the Plaintiff in Reverſion for Years was void as to Courts-Leet, as being a Judicial Office, but was good as to Courts-Baron. And as to the Objection, That this Action will not lie for the Money received by the Defendant as Money received for the Plaintiff's Uſe, becauſe the Defendant claimed Title by another Grant made to himſelf, and therefore received it to his own Uſe; and that the Plaintiff ſhould have brought an Action of Trover for the Money, or Caſe, for diſturbing him in his Office; the Court anſwered, That it might be hard perhaps to maintain it, if this were a new Caſe, and the firſt of this Nature; but they ſaid two or three Actions of this Kind had been held before, and cited a Caſe between *Bradſhaw* and *Porter*, of *Grays Inn*, for Money received as Judge of the Sheriff's Court of *London* to be ſo reſolved; and therefore it would be hard now to adjudge the contrary. But at the importunity of *Jones*, Attorney General, to be farther heard in this Caſe, it was adjourned.

Vide ante 174. Poſt. 254.

* P. 246

* *Stables* againſt *Mellon.*

Caſe by a Burgeſs for Common in the Mayor, and Burgeſſes as in Groſs without Appendancy. 2 Jon. 115. 1 Mod. 6, 7, 74. 1 Saund. 343 2 Saund. 4, 5. 3 Lev. 196. 2 Lev. 2. 2 Show. pl. 30. 1 Sid. 313. 1 Vent. 163, 383.

CASE for Diſturbance of his Common, and preſcribes that the Mayor and Burgeſſes have Time out of Mind had Common for themſelves, *& quolibet eorum*, and brings the Action as Burgeſs; the Preſcription was traverſed, and Verdict for the Plaintiff. And *Weſton* moved in Arreſt of Judgment, That the Preſcription was not good, 1ſt. Becauſe it is not laid to be appurtenant to any Land. 2dly, The Prohibition ought not to be in the Name of the *Mayor and Burgeſſes*, but he ought to have preſcribed in every Burgeſs, *quod quilibet Burgenſium, &c.* and that it ought to be alledged in

Poſt. 253. Vide Hard. 118. 3 Mod. 290. Co. Lit. 122. a. March. 83.

in the Corporation by Way of Cuſtom, *Rolle Common*, 403. *Green* and *Stain's* Caſe. 5 *E.* 4. 29, 32. *Curia contra.* This might be a Common in Groſs, and not appurtenant to any Land, 9 *H.* 6. 36. 1 *Co. Rep.* 87. As if a Man grant Common to the Mayor and Burgeſſes for all their Cattle in ſuch a Place, it is good as a Common in Groſs, and not appurtenant; and ſo Judgment was given for the Plaintiff.

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* Term. Paſchæ,

* P. 247

ANNO

31 Car. II. in Banco Regis.

Farmer qui tam, &c. againſt *Brown.*

PROHIBITION to the Spiritual Court, for that they compelled the Defendant to anſwer upon Oath there in a Suit for not repairing of the Church; ſuggeſting, that the Eccleſiaſtical Court ought not to require Anſwer upon Oath *niſi tantum in rebus teſtamentariis & matrimonialibus*; and this being a Point of great Conſideration, the Plaintiff was ordered to declare, that the Caſe might be judicially determined upon Demurrer. And for the Defendant in the *Prohibition* 'twas argued, that the Spiritual Court might in ſuch Caſes take Anſwers upon Oath, and that the *Writ* mentioned in *Raſt. Abridg. Prohibition* 5. and in the Regiſter, are Things antiquated, originally deviſed for the Prevention

Anſwering upon Oath in Eccleſiaſtical Courts. S. C. 2 Jon. 122. 3 Keb. 802. 819, 829. 1 Vent. 339. 2 Show.

Citation *pro læſione fidei.*

tion of two Things practiſed antiently among the Clergy, but now diſuſed; they had a cuſtom of citing Men before them *pro læſione fidei* in not performing their Agreements, and forcing them to ſwear Performance. Thoſe were the Miſchiefs intended to be reformed by the Inſtitution of theſe Writs. *Coſin's Apology, part* 1. *cap.* 11. *fol.* 77, 78. *& ibid. eadem parte, cap.* 8. *& Regiſter* 43. *a.* And the *Juramentum calumniæ* mentioned *Co.* 2. *Inſt.* 657. was another Invention of theirs to make a Man accuſe himſelf of Crimes, which is not lawful. But as for anſwering upon Oath in Civil Caſes, it hath been their conſtant Courſe Time out of Mind, * as it is in Chancery, and every Jot as well allowable in this Court as in that; and in Chancery they never compel a Man to anſwer upon Oath to Matter criminal, or ſcandalous. To which *Maynard*, King's Serjeant, in Anſwer cited the Regiſter 38. *F. N. B.* 41. and *Co.* 2 *Inſt.* 621. He ſaid, the Eccleſiaſtical Court had unqueſtionably a Juriſdiction in the principal Matter, but they had no Juriſdiction but by Incroachment to adminiſter Oaths *niſi tantum in cauſis teſtamentariis & matrimonialibus*; that the Statute of *Ed.* 6. allows them Juriſdiction in the Caſe of Tithes by any legal Means other than that of the Party's Oath; which ſhews, that the Parliament intended that they ſhould not have Power to adminiſter Oaths in ſuch Caſes; and yet this is a civil Caſe: That they may proceed by Anſwer without Oath of the Parties, and by Proofs thereupon, as all Proceedings are at Common Law, where the Party is never compelled to put in his Anſwer or Plea upon Oath, except in Caſe it be a foreign Plea, which ſtands upon a particular Reaſon; *viz.* That it is to ouſt the Court of Juriſdiction, and tends to manifeſt Delay; That Dr. *Coſins* is of no Authority where any Difference is between the Common and the Canon Law; And as to Chancery, that their taking Anſwer upon Oath is a very antient Uſage, but no Precedent for other Courts to do the like in Matters without ſuch Uſage. *Scroggs*; There may be the ſame Reaſon to take Pleas and Anſwers upon Oath in this Court, that there is for ſo doing in Chancery; but the uſage of Courts makes a Law in ſuch Caſe. *Adjournatur*, and in *Trin. Term. prox.* 'twas argued again at Bar, and againſt the Juriſdiction of the Eccleſiaſtical Courts to give Oaths in ſuch

Juramentum Calumniæ.

* P. 248

Caſes were cited *Raſt. Stat. Tit. Conſultation, fol.* 223. *b. Hob.* 84. *Reg.* 36. *Co.* 2. *Inſt.* 557. 657. *Roll. Chan.* 371. And the Civilians were alſo heard in this Caſe, who affirmed it had been the conſtant Practice of their Courts to proceed upon Oath, and to ouſt them of this Power would be to deſtroy their Courts: That this was never diſputed 'till now by theſe Defendants, who being *Quakers* would not take any Oath, and ſo for their own particular Sakes made this Attempt to deſtroy the Eccleſiaſtical Courts: That the Common Law itſelf in ſome Caſes requires Anſwer ſhould be upon Oath, as in *Leygager*; and that the Courſe and Uſage of all Courts was the Law of the Courts: *Dolben* Juſtice cited the Caſe of *Scarr verſus Burwell* in this Court in 1664, when *Scarr* being ſued in the Eccleſiaſtical * Court for being at Church with his Hat on in Time of Divine Service, and compelled to anſwer upon Oath, prayed a *Prohibition* for that Cauſe upon the ſame Grounds now offered. Whereupon *Twyſden* held a *Prohibition* ought to be granted, to which alſo *Kelynge* inclined; but *Hyde* Chief-Juſtice *totis viribus contra:* And after the Court coming to know by Information that this was always the Courſe of the Court, a *Prohibition* was denied: And afterwards in this Caſe a *Conſultation* war granted *per totam Curiam, Scroggs* Chief-Juſt. *Jones, Dolben* and *Pemberton.*

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Vid. 1 Saun. 14.

Q. ante.

Freak againſt *Lea.*

EJECTMENT upon *Non Culp.* and a Special Verdict, the Caſe was: One ſeiſed in Fee of Lands worth 10*l. per Annum* deviſed Legacies to ſeveral Perſons to be paid out of the Land, amounting in all to 120*l.* within a Year after his Death; and after deviſed the Land without any Limitation of Eſtate to *J. S.* under whom the Defendant claims. The Deviſee enjoyed the Land three years, and paid 30*l.* of the Legacies, and his Executor after his Death ſecured the Reſidue: The Heir of the Deviſee entered, and brought an

Deviſe of 120*l.* Legacies to be paid out of 10*l. per An.* within a Year, and deviſes the Land to *J. S.* and does not ſay *paying*; yet a Fee paſſes. S. C. 2 Jo. 113. Poll. 553. 2 Show. Pl. 28.

Vid. ante 104. 2 Jon. 107. 113. 137. 1 Mod. 189. 1 Lutw. 762. Lat. 9, 39, 134. &c. Ante 104. Gilb. on Dev. 35. Cowp. 835. Doug. 321.

an Ejectment; and 'twas argued by *Pollexfen* for the Plaintiff, that the Deviſee hath only an Eſtate for Life; for this is not a *Deviſe paying*, but here the Payment is to be made out of the Profits, and the Land is bound in the Hands of the Heir, or whoſoever it comes to. *Saunders contra*: This muſt be a Fee of Neceſſity; otherwiſe the Deviſee can never pay 12*l.* out of the Eſtate, being but 10*l. per Annum*; and therefore 'tis to be looked upon as all one with the Caſes *paying*. *Jones* Juſt. held it was a Fee, but conditionally, as *paying*; which Condition by not paying within the Year is broken, and therefore the Entry of the *Heir* good. *Cæteri tres*; 'tis a Fee not conditional, but in *Truſt* to pay; and gave Judgment for the Defendant.

* P. 250

* *Hill* againſt *Barne.*

Prieſt or not Prieſt, how triable. S. C. 3 Keb. 567, 827. 2 Jon. 131. 2 Show. pag. 52.

PROHIBITION to ſtay a Suit in the Eccleſiaſtical Court to deprive a Parſon, libelling there that he was not a *Prieſt*, ſuggeſting here that at the Time of his Inſtitution he was a *Prieſt* by Epiſcopal Ordination. The Defendant pleaded, that at the Time of his Inſtitution he was not a Prieſt *per Epiſcopal Ordination, Et de hoc ponit ſe ſuper patriam.* The Plaintiff demurred, and the ſole Queſtion was, how this Iſſue ſhould be tried? For the Defendant hath put it upon a Trial *per Pais.* And now 'twas argued by *Maſters* for the Plaintiff, and agreed that *Prieſt* or *not Prieſt* is triable by the Ordinary, but *Prieſt* or *not Prieſt* at ſuch a Time is triable *per Pais.* *Plow. Com.* 14 *b. Roll. Trial* 575. *Pollexfen contra.* By the Statute of Uniformity all that are not Prieſts are diſabled to have *Livings*, and then if not *prieſt*, the Preſentation, *&c.* are all void, and the Church itſelf void; and then void or not void is to be tried *per Pais.* *Jones Juſt.* In this Caſe the Trial ought to be by the Ordinary, becauſe the Time refers to a *Spiritual* Act, *ſcil. Inſtitution*; But where the Time refers to a *Temporal* Act, as a *Feoffment, &c.* it ſhall be tried *per Pais.* *Sed adjournatur.*

See 2 Show. 55. a Conſultation granted.

Herring

Herring againſt *Finch.*

CASE; whereas the Plaintiff was a Freeman, and had a Voice in the Election of *Mayors*, the Defendant the preſent Mayor refuſed to receive his Vote; and now upon Iſſue and Trial the Plaintiff was Nonſuit, but the *Roll* not *marked* for double Coſts. And now the Defendant moved to have double Coſts, which was oppoſed, becauſe it does not appear whether the Plaintiff was Non-ſuit for Want of Proof that the Defendant was the preſent Mayor. 2. The Statute gives double Coſts where the Officer is ſued for Matter done by him in doing his Office, and this Suit is for *non fezans* in his Office. *Cur.* This Caſe is not within the * Intent of the Statute; the Scope whereof was, that whereas Mayors, *&c.* were ſued for falſe Impriſonment, or ſuch Matters, wherein they ought to juſtify that they may plead the *General Iſſue*, and ſhall have *double Coſts*, but not in ſuch Caſes as this.

Caſe againſt a Mayor for not receiving his Vote, and was Nonſuit, he ſhall not pay double Coſts. Vid. ante 50, 1114, &c. ib. 6 Mod. 45. 1 Sal. 19, 20. 2 Sal. 502. 2 Vent. 50.

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Etherington againſt the Archbiſhop of *York.*

A PROHIBITION was prayed ſuggeſting that by *Stat.* 28 *H.* 8. 16. *All Briefs, Bulls, &c. of the Pope ſhall be void, and ſhall not be pleaded, uſed or allowed in any Court*; and yet the Defendant libelled againſt him in the Spiritual Court for a Penſion, ſetting forth that the Church of *Rillington* was appropriated *per ſanctiſſimum Patrem Clement. Divina Providentia Papam ſextum, Anno Domini*, 1443. *al Abby de Belland*, and that upon the Appropriation the Abbot granted to ſuch a Biſhop the Penſion, and that ſo he grounded his Suit upon the Pope's Bull contrary to this Statute: To which 'twas anſwered, that the Bull and Appropriation are not uſed otherwiſe than as Inducements to his Title, which is founded upon the Grant of the Penſion, and 'twas neceſſary to ſhew the Appropriation;

Pope's Bull pleaded as Inducement notwithſtanding Stat. of H. 8. Vide Diſmes Roll. Abr.

Appropriation; for till the Appropriation no Penſion could be granted by the Abbot, and it ought to appear how the Appropriation was. The Statute does not extend to this Caſe; for the Statute directs that they who have Liberties, *&c.* granted by the Pope, ought to come to the King within a Year, and take new Grants from the King, which ſhall be of the ſame Force and Efficacy as the Pope's Bulls, *&c.* Here the Bull was not made to the Archbiſhop, nor could he have a Grant of the Penſion from the King, for 'twas not granted to him by the Pope, as it is not neceſſary for the Biſhop to ſhew the King's Confirmation, for that is not his Title, but only Matter of Inducement. The *Prohibition* was denied. *Levinz* for the Archbiſhop.

* P. 252 * The Barber Surgeons of *London* againſt *Pelſon.*

Aſſumpſit by Corporation aggregate for Money forfeited upon a By-Law. S. C. 1 Danv. 28 pl. 11. Promiſe to a Corporation without Deed. Vide ante, 142. 174, 245, &c. ib 2 Salk. 683, 684.

ASSUMPSIT, and declares, that the Defendant being indebted to him 20*l.* forfeited by the Conſtitutions and Ordinances of the Company for not ſerving in the Office of Steward of the Company, according to a By-law there made, promiſed to pay it. The Defendant demurred, 1*ſt*, For that this Action lies not for Money forfeited by a By-Law. 2*ndly*, A Promiſe cannot be made to a Corporation aggregate without Deed. *Sed per Curiam*: The Action lies; and both theſe Objections were made to the Caſe of the Mayor of *London*, *v. Gorrey*. And yet Judgment there given for the Plaintiff; and ſo it was here.

Hinks againſt *Clerk.*

Stranger puts his Beaſts into a Common, Commoner may diſtrain them. S. C. 2 Show. pl. 12. Vide ante, 246.

ERROR of a Judgment in *Replevin* in *Durham*, where the Plaintiff avowed that *Sunderland* is an ancient Borough, conſiſting of twelve capital Burgeſſes, *vocat. Freemen*, and twelve inferior Burgeſſes, *vocat' Stallingers*, and that there is a Cuſtom there, That every Freeman inhabiting any Houſe there, hath Com-

mon

mon in the Place where for ſo many Beaſts, *ſcil.* for two Horſe Beaſts, and four Cows; and that every *Stallenger* inhabiting any Meſſuage there, hath Common for one Cow; and becauſe the Plaintiff being a Stranger put his Beaſts there to the prejudice of his Common, the Defendant avowed the taking. The Plaintiff traverſed the Cuſtom; and the Jury found that the Capital Burgeſſes *ſcil.* the Freemen have had Common for two Horſe Beaſts, and four Cows, and that the *Stallengers* have Common for one Cow. But farther they found, That the Wife of every Freeman or Stallinger inhabiting, have the ſame Common after the Death of their Huſbands. And that the Copyholders, Burgeſſes and Stallingers have * Common alſo *pro Vaches, Vitulis, Bobus, Spadonibus, Juvencis & omnibus ad quantitatem & loco & vice Anglice*, their Stints, *ut præſent' limitat' & ſi ſuper tota materia, &c.* for the Plaintiff; upon which Verdict Judgment was given for the Avowant, and therein two Errors aſſigned. 1. That the Common found varies and differs from the Common pleaded, *ſcil. for Sheep, Calves, Heifers, &c.* 2. A Cuſtom for Inhabitants to have Common, is naught, and all one with *Gateward's* Caſe, 6 *Co. Rep.* To which it was anſwered and reſolved. 1. The Jury have found the Cuſtom expreſly at firſt, and the farther Finding is void, like the Caſe in *Dyer.* In *Aſſumpſit* the Jury found that the Defendant did aſſume *modo & forma*, if *J. S.* ſaid true; this is good, and the *ſi, &c.* ſurpluſage and void; and 3 *Cro.* 405. *Gray v. Fletcher, ibid, &c.* 546. *Lovelace v. Reynolds* in Point. 2. The Cuſtom here is not for Inhabitants, but for Freemen and Stallingers and Inhabitants of the Corporation, and the Habitation in this Caſe is only reſtrictive, *ſcil.* no Common unleſs they inhabit. 3. The Cuſtom alledged for every Member is good, as well as when laid in the Corporation, to have for them, and each Member, *&c.* as was done in the Caſe of *Derby, int' Stables* and *Mellor, ante.* And of this Opinion was the Court, and affirmed the Judgment. *Holt Judior pro Querente, Levinz* for the Defendant in Error.

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Jury find the Iſſue and more, good for the Iſſue, void for the reſt.

Cuſtom for Freemen inhabiting good, *vlitter* for Inhabitants.

Every Member may preſcribe in right of the Corporation. Vide ante 246. 1 Saund. 343. 2 Saund. 4, 5.

Term.

Term. Sanct. Trin.

ANNO

Car. II. in Banco Regis.

Wortly againſt *Watkinſon.*

A Man marries his firſt Wife Siſter's Daughter. S. C. 2. Jo. 118. Ray. 464. 2 Show. pl. 56. 3 Keb. 620. 666. Vide 2 Vent. 9. Vaugh. 206 *to* 330. & 302 *to* 330. 3 Lev. 364. 4 Leon. 16. 3 Keb. 151. 166, 620, 656. Nelſ. Lutw. 342 1 Mod. 25. Hob. 181. Mo. 907. 2 Jon. 118.

PROHIBITION was prayed to ſtay a Suit in the Court of *York*, *Paſch.* 28. *Car.* 2. for diſſolving a Marriage had betwixt one and the *Daughter of his firſt Wife*, becauſe this is not within the Levitical Degrees, and a Prohibition was granted *niſi cauſa*, *&c.* at which Day came Sir *John King*, and prayed a Conſultation, becauſe it is within the Levitical Degrees, *ſcil.* 8. *Levit. ver.* 14. *The Nephew ſhall not marry his Father's Brother's Wife*, a pari ratione, *the Uncle ſhall not marry his Wife's Siſter's Daughter*, for they ſtand in the ſame Degree of Proximity; and he ſaid *Parſon's* Caſe. *Co.* 1 *Inſt.* 252. *in Margine* is the only Caſe againſt him; and though a Prohibition was there granted, yet he ſaid Conſultation was afterwards awarded. And as Authorities for him he cited *Man's* Caſe, *Moore* 907. 3 *Cro.* 228. *Hill.* 11 *Car.* 1. *B R. Allen v. Weſton. Hob.* 181. 2 *Roll.* 832. and *Hill v. Gord in Communi Banco*, 1672. Where the marriage of a Man with the Siſter of his firſt Wife, was not judged illegal, reported now by *Vaughan*, *Twyſden*, Juſtice, cited *Allington's* Caſe, wherein it was reſolved, That tho' the *nephew* cannot marry the Aunt, yet the Uncle may marry the Niece;

Niece; becauſe in the firſt Caſe the Wife was ſuperior to her Huſband in Point of Parentage, and therefore the marriage incongruous. But in the latter Caſe the Uncle is ſuperior to the Niece as well in Point of Parentage as in Point of * Matrimonial Government. But the Court being unwilling to grant a Conſultation upon Motion, ordered the Plaintiff ſhould declare, ſo that the Matter ſhould come judicially before them. Accordingly it was done, and the Caſe was argued again much to the ſame Purpoſe as before for the Conſultation: And on the other Side by *Wallop*, who much enforced the Caſe of *Allington*, and cited *Grotius de jure belli, lib.* 2. *cap.* 5. *Sect.* 12. and *Seld. Ux. Hebraica*, 594. and that the Reaſon why a Marriage between the Nephew and the Aunt is void, was for the Contradiction, and becauſe the Wife ought to be in Subjection to her Huſband in Point of Marriage, and yet in Point of Parentage would be ſuperior to her own Huſband; and he ſaid, Marriages are not a Moral Law, but admitted by Chriſtians by Eccleſiaſtical Authority, and therefore the *Romiſh* Doctors hold, that as it was inſtituted by the Authority of the Church, it may be diſſolved by the ſame Authority: And 'till Marriage became a Sacrament they held it diſſolveable for many more Cauſes than they have done ſince they have brought it to be a Sacrament, and therefore it ſtands upon the ſame Reaſon it did before; and not being in this directly prohibited by the Levitical Law, though another Caſe of the ſame Propinquity be forbidden, *ſcil.* the Nephew and the Aunt, yet this Marriage between the Uncle and the Niece ought not to be prohibited, becauſe it is not of the ſame Contradiction and Abſurdity. 'Twas adjourned, but afterwards (as I heard) a Conſultation was granted.

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Vid. Cod. Civil To. 2. p. 492, &c.

[*See* 2 Jon. 118. *That the Prohibition was for marrying his* Wife's Siſter's Daughter; *and* Raym. 464. ſays, 'twas *his* Siſter's Daughter. *But* Levinz ſupra *ſays, 'twas the* Daughter *of his* firſt Wife. Ergo quære, & vide Nelſon's Lutw. 342. 3 Keb. 620, & 660.]

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